Supreme Court, U.S.
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NO.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1995

ST. JUDE HOSPITAL OF KENNER, LOUISIANA, INC., ST. JUDE MEDICAL OFFICE BUILDINGS LIMITED PARTNERSHIP, and KROWN DRUGS, INC.,

Petitioners,

v.

THE TRAVELERS INSURANCE COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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206 pp

QUESTIONS PRESENTED FOR REVIEW

1. Did the United States District Court for the Eastern District of Louisiana depart from the accepted and usual course of judicial proceedings by violating an unambiguous mandate issued by the United States Court of Appeals for the Fifth Circuit when it calculated prejudgment interest in a manner inconsistent with a judgment rendered by the district court that had already been affirmed by the Fifth Circuit?

2. Did the Fifth Circuit sanction the district court's departure from the accepted and usual course of judicial proceedings by affirming the district court's calculation of prejudgment interest in a manner that violated the unambiguous mandate that had been previously issued by the Fifth Circuit?

PARTIES TO THE PROCEEDING

The parties to the consolidated proceedings in the United States Court of Appeals for the Fifth Circuit were:

St. Jude Hospital of Kenner, Louisiana, Inc.

St. Jude Medical Office Buildings Limited Partnership

Krown Drugs, Inc.

Liljeberg Enterprises, Inc.

John A. Liljeberg Jr.

Robert Liljeberg

The Travelers Insurance Company

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW . . .	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
JURISDICTION	3
STATEMENT OF THE CASE	3
ARGUMENT	
BY AFFIRMING AN ORDER OF THE DISTRICT COURT THAT ENTERED DAMAGES IN VIOLATION OF THE UNAMBIGUOUS MANDATE ISSUED BY THE FIFTH CIRCUIT ON MAY 31, 1994, THE FIFTH CIRCUIT, IN ITS MAY 24, 1995 OPINION, SANCTIONED A DEPARTURE BY THE DISTRICT COURT FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS	9
CONCLUSION	37
APPENDIX	A-1

TABLE OF AUTHORITIES

Cases	Page
American Totalisator Co. v. Fair Grounds Corp., 3 F.3d 810 (5th Cir. 1993)	31
Arizona v. California, 460 U.S. 605 (1983)	11
Briggs v. Pennsylvania Railroad, 334 U.S. 304 (1948)	12
Burger King Corp. v. Pilgrim's Pride Corp., 15 F.3d 166 (11th Cir. 1994)	35
Christianson v. Colt Industries Operating Corp., 486 U.S. 800 (1988)	11, 35
Clements v. Steele, 786 F.2d 673 (5th Cir. 1986)	12, 20
Dickinson v. Auto Center Manufacturing Co., 733 F.2d 1092 (5th Cir. 1983)	32
Eakin v. Continental Illinois National Bank & Trust Co. of Chicago, 875 F.2d 114 (7th Cir. 1989)	28
Frazier v. Heebe, 482 U.S. 641 (1987)	13
Girard v. Drexel Burnham Lambert, Inc., 805 F.2d 607 (5th Cir. 1986)	34

TABLE OF AUTHORITIES (CONT'D)

Cases — Page

Gulf Coast Building & Supply Co. v. International Brotherhood of Electrical Workers, Local No.480, 460 F.2d 105 (5th Cir. 1972) 19, 20

Gurley v. Lindsley, 459 F.2d 268 (5th Cir. 1972) 31

In re United States, 207 F.2d 567 (5th Cir. 1953) 20

Huch v. United States, 439 U.S. 1007 (1978) 10

Litman v. Massachusetts Mutual Life Insurance Co., 825 F.2d 1506 (11th Cir. 1987) (en banc), cert. denied, 484 U.S. 1006 (1988) 13

Masinter v. Tenneco Oil Co., 934 F.2d 67 (5th Cir. 1991) 33

Narcise v. Illinois Central Railroad, 427 So. 2d 1192 (La. 1983) 25, 26, 27

Sparks v. Duval County Ranch Co., 604 F.2d 976 (5th Cir. 1979) (en banc), aff'd on other grounds sub nom. Dennis v. Sparks, 449 U.S. 24 (1980) . . 33

Spearman v. J&S Farms, Inc., 755 F. Supp. 137 (D.S.C. 1990) . . 31

TABLE OF AUTHORITIES (CONT'D)

Cases — Page

Travelers Insurance Co. v. Liljeberg Enterprises, Inc., 799 F. Supp. 641 (E.D. La. 1992) 1, 5

Travelers Insurance Co. v. Liljeberg Enterprises, Inc., 7 F.3d 1203 (5th Cir. 1993) . . 2, 7

Travelers Insurance Co. v. St. Jude Hospital of Kenner, Louisiana, Inc., 21 F.3d 1107 (5th Cir. 1994) (No. 92-9579; unpublished) . 2, 7, 16, 22 passim

Travelers Insurance Co. v. St. Jude Hospital of Kenner, Louisiana, Inc., 56 F.3d 1386 (5th Cir. 1995) (Nos. 94-30636, 94-30639, 94-30665; unpublished) . . 3, 9, 32, 34 passim

Travelers Insurance Co. v. St. Jude Hospital of Kenner, Louisiana, Inc. (E.D. La. 1994) (No. 90-1983 c/w 90-2601; unpublished) 2

Statutes

La. Civ. Code Ann. art. 2000 (West Supp. 1995) 27

La. Civ. Code Ann. art. 2924 (West 1994) . . . . . 7, 8, 17, 27 passim

TABLE OF AUTHORITIES (CONT'D)

Statutes — Page

La. Rev. Stat. Ann. § 13:4203 (West 1991) 16, 27

28 U.S.C. § 1254 3

28 U.S.C. § 1332 5

5th Cir. R. 41.2 33

Sup. Ct. R. 10.1 10

Other

1B J. Moore, J. Lucas & T. Currier, Moore's Federal Practice ¶ 0.404[1] (1984) 11

1B J. Moore & J. Lucas, Moore's Federal Practice ¶ 0.404[10] (2d ed. 1995) 21

49 C.J.S. "Judgments" § 436 (1947) . 31

OPINIONS BELOW

The United States District Court for the Eastern District of Louisiana issued an Order and Reasons in consolidated Case No. 90-1983 c/w 90-2601 on November 24, 1992 granting, in part, the Respondent's motion to alter or amend a judgment entered by the district court on August 18, 1992. This unpublished opinion is set forth in the Appendix at A-51. The district court filed an opinion in connection with its entry of summary judgment in favor of the Respondent on certain issues on August 13, 1992. Travelers Insurance Co. v. Liljeberg Enterprises, Inc., 799 F. Supp. 641 (E.D. La. 1992) (A-13). The district court's order granting summary judgment was affirmed in part and reversed and remanded in part by the United States Court of Appeals for the Fifth Circuit in an opinion dated November 26, 1993. Travelers Insurance Co. v. Liljeberg

Enterprises, Inc., 7 F.3d 1203 (5th Cir. 1993) [hereinafter Travelers I] (A-96).

On April 20, 1994, the Fifth Circuit issued an opinion affirming in part and reversing and remanding in part an amended judgment entered by the district court on December 3, 1992. Travelers Insurance Co. v. St. Jude Hospital of Kenner, Louisiana, Inc., 21 F.3d 1107 (5th Cir. 1994) (No. 92-9579; unpublished) [hereinafter Travelers II] (A-122). On October 21, 1994, the district court filed an Order and Reasons explaining, among other things, its calculation of prejudgment interest in connection with the judgment being entered against the Petitioners. Travelers Insurance Co. v. St. Jude Hospital of Kenner, Louisiana, Inc. (E.D. La. 1994) (No. 90-1983 c/w 90-2601; unpublished) (A-145). The Fifth Circuit affirmed the district court's calculation of prejudgment interest on the Petitioners' obligation in an

opinion dated May 24, 1995. Travelers Insurance Co. v. St. Jude Hospital of Kenner, Louisiana, Inc., 56 F.3d 1386 (5th Cir. 1995) (Nos. 94-30636, 94-30639, 94-30665; unpublished) [hereinafter Travelers III] (A-1).

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit sought to be reviewed was entered on May 24, 1995. Jurisdiction to review the judgment in question by writ of certiorari is conferred on this Court by 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

In May 1985, Liljeberg Enterprises, Inc. (LEI), leased space in the St. Jude Medical Office Building (the "Building") from the St. Jude Medical Office Building

Limited Partnership (the "Partnership").[1] In October 1985, The Travelers Insurance Company ("Travelers") loaned the Partnership $25 million, secured by a first-priority mortgage on the Building and a collateral assignment of all of its leases. In May 1987, Krown Drugs, Inc. ("Krown") leased space in the Building from the Partnership.[2] After the Partnership defaulted on its payments to Travelers, Travelers filed suit in the United States District Court for the Eastern District of Louisiana in June 1990, seeking, among other things, seizure and judicial sale of the Building, unpaid rent

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[1]The lease agreement between LEI and the Partnership is hereinafter referred to as the "LEI Lease."

[2]The lease agreement between Krown and the Partnership is hereinafter referred to as the "Krown Lease." Petitioners Krown, the Partnership, and St. Jude Hospital of Kenner, Louisiana, Inc., the sole general partner of the Partnership, are all entities controlled by John A. Liljeberg Jr. and Robert Liljeberg.

from tenants Krown and LEI under their respective leases, and joint liability of the Partnership for the unpaid rent of Krown and LEI under a tortious misrepresentation theory. The basis for federal jurisdiction in the district court was diversity of citizenship. 28 U.S.C. § 1332.

The case was brought to trial and resulted in a judgment dated August 18, 1992 (A-33). The judgment was consistent with a number of prior orders entered by the district court, including an August 13, 1992 order entering summary judgment in favor of Travelers for total rent payments due from LEI in connection with the LEI Lease, together with legal interest from the date of judgment. Travelers Insurance Co. v. Liljeberg Enterprises, Inc., 799 F. Supp. 641 (E.D. La. 1992) (A-13).

In response to a motion and cross-motion for new trial, or alternatively to alter the August 18, 1992 judgment, the district court entered an amended judgment on December 3, 1992 (A-78). The amended judgment reflected the court's adoption of the Partnership's position that it was liable for interest on the judgment at the judicial rate, rather than the contractual rates specified in the LEI and the Krown Leases. This, and other adjustments, resulted in a substantial reduction of the damages payable by the Partnership.

Certain aspects of the district court's decision were then reviewed by the United States Court of Appeals for the Fifth Circuit. In a decision rendered on November 26, 1993, the Fifth Circuit, in the portion of the opinion relevant for purposes of this Petition, remanded the case to the district court for calculation of prejudgment interest on the LEI Lease

at the legal rate specified in La. Civ. Code Ann. art. 2924 (West 1994). Travelers Insurance Co. v. Liljeberg Enterprises, Inc., 7 F.3d 1203 (5th Cir. 1993) [Travelers I] (A-96).[3]

On April 20, 1994, the Fifth Circuit issued an opinion concerning the entire December 3, 1992 amended judgment, which had been appealed by the Partnership and cross-appealed by Travelers. Travelers Insurance Co. v. St. Jude Hospital of Kenner, Louisiana, Inc., 21 F.3d 1107 (5th Cir. 1994) (No. 92-9579; unpublished) [Travelers II] (A-122).[4] The Fifth Circuit affirmed the judgment of the district court in all respects, except that the Fifth Circuit remanded the case to the

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[3]The panel in Travelers I was comprised of Circuit Judges Jolly, Reynaldo G. Garza, and Sneed (Senior Circuit Judge of the Ninth Circuit, sitting by designation).

[4]The panel in Travelers II was comprised of Circuit Judges Wiener, Barksdale, and Emilio M. Garza.

district court (1) to supplement its judgment to determine and award Travelers' reasonable attorney's fees, and (2) to recalculate the prejudgment interest on the LEI Lease in accordance with La. Civ. Code Ann. art. 2924. The Fifth Circuit's decision was issued as a mandate on May 31, 1994 (A-140).

On November 3, 1994, the district court entered its second amended judgment in the amount of $7,784,385.75 (A-158). This figure included prejudgment interest on the award given in connection with the Krown Lease at the contractual rate, despite the provision in the December 3, 1992 amended judgment indicating that the Partnership would be liable for prejudgment interest on the Krown Lease at the much lower judicial rate (A-150 to A-153). On appeal, the Fifth Circuit affirmed the district court's decision to calculate the Partnership's liability for

prejudgment interest at the rate stipulated in the Krown Lease. Travelers Insurance Co. v. St. Jude Hospital of Kenner, Louisiana, Inc., 56 F.3d 1386 (5th Cir. 1995) (Nos. 94-30636, 94-30639, 94-30665; unpublished) [Travelers III] (A-1).[5]

ARGUMENT

BY AFFIRMING AN ORDER OF THE DISTRICT COURT THAT ENTERED DAMAGES IN VIOLATION OF THE UNAMBIGUOUS MANDATE ISSUED BY THE FIFTH CIRCUIT ON MAY 31, 1994, THE FIFTH CIRCUIT, IN ITS MAY 24, 1995 OPINION, SANCTIONED A DEPARTURE BY THE DISTRICT COURT FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS.

The Rules of this Court indicate that one of the reasons that this Court will consider in deciding whether to grant a petition for writ of certiorari is when a United States court of appeals "has so far

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[5]The panel in Travelers III was comprised of Circuit Judges Duhe, Wiener, and Stewart.

departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision." Sup. Ct. R. 10.1(a); see also Huch v. United States, 439 U.S. 1007, 1012 (1978) (Rehnquist, J., dissenting) (petition for writ of certiorari should have been granted to review opinion of Fifth Circuit that represented a departure "from the accepted and usual course of judicial proceedings"). In this case, by affirming an order of the district court that entered damages in violation of the unambiguous mandate issued by the United States Court of Appeals for the Fifth Circuit on May 31, 1994, the Fifth Circuit, in its May 24, 1995 opinion, sanctioned a departure by the district court "from the accepted and usual course of judicial proceedings."

The doctrine of the law of the case is an important component in determining the accepted and usual course of judicial proceedings. As most commonly defined, "the doctrine posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." Arizona v. California, 460 U.S. 605, 618 (1983). The important purpose served by this rule of practice is to "promote[] the finality and efficiency of the judicial process by 'protecting against the agitation of settled issues.'" Christianson v. Colt Industries Operating Corp., 486 U.S. 800, 816 (1988) (quoting 1B J. Moore, J. Lucas & T. Currier, Moore's Federal Practice ¶ 0.404[1] at 118 (1984)).

The mandate rule is a specific application of the law of the case doctrine pursuant to which the district court in a particular case owes obedience to the

mandate of this Court or of the court of appeals issued earlier in the same case, and must carry it into effect according to its terms. See Clements v. Steele, 786 F.2d 673, 675 (5th Cir. 1986) ("The mandate of an appellate court is controlling on remand. The district court must comply with that mandate and may not disturb any issues that the appellate court affirmed or decided"); see also Briggs v. Pennsylvania Railroad, 334 U.S. 304, 306-07 (1948) (after mandate that does not provide for interest has been issued, district court does not have power to award interest). As a subset of the doctrine of the law of the case, the function of the mandate rule has been explained in terms similar to those used to explain the purpose served by the law of the case doctrine:

> When an appellate court issues a specific mandate it is not subject to interpretation; the district court has an obli-

> gation to carry out the order. A different result would encourage and invite district courts to engage in ad hoc analysis of the propriety of appellate court rulings. Postmandate maneuvering in the district courts would undermine the authority of appellate courts and create a great deal of uncertainty in the judicial process. It would also eliminate any hope of finality.

Litman v. Massachusetts Mutual Life Insurance Co., 825 F.2d 1506, 1511-12 (11th Cir. 1987) (en banc), cert. denied, 484 U.S. 1006 (1988). Since a violation of the mandate rule thus undermines the entire appellate structure of the federal system, this Court should exercise its powers of supervision over the federal courts to remedy such a violation. See Frazier v. Heebe, 482 U.S. 641, 647 n.7 (1987) (the Court's supervisory power over federal courts allows the Court to intervene to protect the integrity of the federal system).

In this case, the mandate in question affirmed in all respects except two the district court's December 3, 1992 amended judgment, which modified a judgment previously entered by the district court on August 18, 1992. The August 18, 1992 judgment originally provided that the Partnership and Krown should be liable in solido for both principal and interest arising out of the judgment rendered against them with respect to the Krown Lease:

> 2. IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Judgment be, and the same hereby is, rendered herein favor of the Travelers Insurance Company, the plaintiff in this action, and against St. Jude Medical Office Buildings Limited Partnership and Krown Drugs, Inc., each to be bound solidarily in the principal amount of $1,699,526.00 together with accrued interest on this Amount through August 15, 1991 in the amount of $2,688,603.00, which interest continues to accrue at the rate of $2,404 per diem from and including August 16, 1991, until paid.

(A-35.) However, the district court later accepted the Partnership's argument that it should not be bound by the contractual rate of interest stipulated in the Krown Lease because its liability was grounded in tort rather than contract (A-55). As such, on December 3, 1992, the district court filed an amended judgment that modified Paragraph 2 of the August 18, 1992 judgment to read as follows:

> 2. IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Judgment be, and the same hereby is, rendered herein favor of the Travelers Insurance Company, the plaintiff in this action, and against St. Jude Medical Office Buildings Limited Partnership and Krown Drugs, Inc., each to be bound solidarily in the principal amount of $1,699,526.00 together with accrued interest on this Amount through August 15, 1991 in the amount of $2,688,603.00, which interest continues to accrue at the rate of $2,404 per diem from and including August 16, 1991, until paid, except that St. Jude Medical Office Buildings Limited Partnership shall be solidarily liable with Krown Drugs, Inc. for interest accruing on the principal amount only to the

> extent of the applicable judicial rate, as provided in La. R. S. 13:4203, for all interest prior to and including the date of this judgment, and as provided in 28 U.S.C. 1961(B), for all interest arising after the date of this judgment and until paid.

(A-80 to A-81.)[6]

The December 3, 1992 amended judgment was appealed by the Partnership and cross-appealed by Travelers. On April 20, 1994, the Fifth Circuit rendered a decision (Travelers II) that, with two exceptions, affirmed in all respects the district court's December 3, 1992 amended judgment. The Fifth Circuit remanded the case to the district court (1) to supplement its judgment to determine and award Travelers' reasonable attorney's fees as to all matters in controversy other than the portion

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[6]La. Rev. Stat. Ann. § 13:4203 (West 1991) provides: "Legal interest shall attach from the date of judicial demand, on all judgments, sounding in damages, "ex delicto", which may be rendered by any of the courts."

of the judgment resulting from liability under the LEI Lease, and (2) to recalculate the prejudgment interest on the LEI Lease in accordance with La. Civ. Code Ann. art. 2924 (which, among other things, sets the rate of legal interest in Louisiana) (A-136 to A-137). However, the Fifth Circuit clearly did not reverse that portion of the district court's judgment that limited the Partnership's solidary liability solely to the principal amount of the obligation arising under the Krown Lease.

> Paralleling the situation we analyzed above in connection with attorney's fees, we discern that in the issue of pre-judgment interest a dichotomy resulting from differences in the two different lease forms--LEI and Krown--is produced for purposes of applying the law of the case doctrine. As noted, Travelers I dealt solely with the LEI leases. And, as was the case with attorney's fees, Travelers I contains a direct finding and holding on pre-judgment interest. Still, for law of the case purposes, such holding is applicable only to LEI lease provisions.

Despite Travelers' insistence that the LEI lease document provision calling for the "highest legal rate allowable" should be interpreted to authorize pre-judgment interest at the highest nonusurious rate available for commercial transactions in Louisiana, we cannot disregard the holding in Travelers I that the phrase "the highest legal rate allowable" incorporates by reference Louisiana's legal or judicial rate, determinable under the applicable provision of the Louisiana Civil Code. Clearly, then, we are constrained by the law of the case doctrine to conclude today that pre-judgment interest on the portion of the district court's damage award to Travelers in the instant case for monies due and owing under the LEI leases should have been calculated in accordance with article 2924 of the Louisiana Civil Code. In other words, we are not at liberty to consider Travelers' argument that the subject LEI lease provision means something different here than we found it to mean in Travelers I. Therefore, on remand, the district court must re-calculate the LEI portion of pre-judgment interest accordingly.

Not so, however, for calculating pre-judgment interest on monies found to be due and owing to Travelers as a result of breaches of the Krown lease (or,

> for that matter, any damages awarded to Travelers by the district court in this case other than under the LEI leases). Travelers I dealt solely with the LEI leases, so that its pronouncements regarding pre-judgment interest are limited--for purposes of the law of the case doctrine--to awards arising from LEI lease obligations only. We therefore leave undisturbed the findings and holdings of the district court concerning pre-judgment interest on all portions of the judgment rendered in favor of Travelers other than the portion thereof attributable to the LEI leases. These unaffected portions include, without limitation, awards arising from or connected with the Krown lease.

(A-133 to A-136 (footnotes omitted; emphasis added).)

As the Fifth Circuit's own pronouncements on the law of the case doctrine indicate, when an appellate court has issued a mandate, any matters that came before the appellate court and which that court disposed of by decree become "'finally settled and . . . the law of the case.'" Gulf Coast Building & Supply Co.

v. International Brotherhood of Electrical Workers, Local No. 480, 460 F.2d 105, 107 (5th Cir. 1972) (quoting In re United States, 207 F.2d 567, 570 (5th Cir. 1953)). Where an entire judgment is presented to the appellate court, an affirmance by the appellate court impliedly disposes of all issues that make up the judgment, including prejudgment interest, and those issues cannot be revisited by the district court on remand. Gulf Coast Building & Supply Co. v. International Brotherhood of Electrical Workers, Local No. 480, supra, 460 F.2d at 107; see also Clements v. Steele, supra, 786 F.2d at 675-76 (Fifth Circuit's affirmance of district court's judgment in favor of employee and against employer necessarily affirmed amount as well as propriety of actual damages awarded, and thus, on remand for determination of co-defendant's liability to employee, district court had

no power to present issue of actual damages to second jury).

Thus, the district court in this case should have calculated the amount of the Partnership's obligation for prejudgment interest arising under the Krown Lease in accordance with Paragraph 2 of the December 3, 1992 amended judgment, since that part of the district court's judgment had been affirmed by the Fifth Circuit's April 20, 1994 judgment, which was issued as a mandate on May 31, 1994. See 1B J. Moore & J. Lucas, Moore's Federal Practice ¶ 0.404[10] at II-63 (2d ed. 1995) ("When a part of a judgment is affirmed, it may not be disturbed on remand"). This the district court failed to do, however. Instead of applying the legal rate of interest, as specified in the December 3, 1992 amended judgment, the district court calculated the Partnership's liability based on the contractual rate of interest stipu-

lated in the Krown Lease, which overstated the Partnership's obligation by approximately $5 million (A-151 ("Since Krown Drugs is liable for interest at the contractual rate, the Partnership, as solidary obligor with Krown Drugs, is likewise liable for interest at the contractual rate")).

The district court based its decision not to follow Paragraph 2 of the December 3, 1992 amended judgment, which had already been appealed to and affirmed by the Fifth Circuit, on its erroneous conclusion that the Fifth Circuit had reached a binding decision in Travelers II on the issue of prejudgment interest under the Krown Lease (A-151 to A-153). However, the statements relied on by the district court were clearly dicta that did nothing to reverse the interest calculation set forth in Paragraph 2 of the December 3, 1992 amended judgment.

The Fifth's Circuit's opinion in Travelers II provides, in relevant part:

> We turn finally to the question of the proper rate to be applied in calculating pre-judgment interest, an element of recovery which the jury determined that Travelers was entitled to receive. Travelers' position on this issue is stated in its brief: "[The Liljeberg defendants are] properly liable for all damages flowing from [their] misrepresentation including all unpaid rent and interest at the contract rate . . . . The accrued interest is an integral part of the damages caused by the [defendants], and should not be segregated from the outstanding rental." Travelers argues that Cross-Appellees' contrary position is, in essence, a red herring intended to obfuscate the solidary liability of those parties by distinguishing the genesis of liability along tort and contractual lines. Our reading of the decision of the Louisiana Supreme Court in Narcise v. Illinois Central Gulf Railroad Co. [427 So.2d 1192 (La. 1983)], to the effect that--regardless of the legal nature of the liability of solidary obligors, i.e., irrespective of the fact that some may be liable in contract and others in tort--each solidary obligor is liable to the obligee for 100% of the indebtedness owed by each other

> co-obligor, convinces us that Travelers is correct. This includes the propriety under Louisiana law of treating accrued pre-judgment interest as an integral part of the damages necessary to compensate the contractually injured party. These maxims of state law support the proposition that the correct way to calculate post-judgment interest is to apply the proper percentage to the entire amount of damages recovered, including in the instant case not only rent but pre-judgment interest as well. Still, we must here focus not so much on the nature of the pre-judgment interest awards or the sum upon which interest is to be calculated, but on the appropriate **rate** of interest to be charged.

(A-131 to A-133 (footnotes omitted; bold emphasis in original, underlined emphasis added).) At that point in its opinion, the Fifth Circuit then engaged in the discussion quoted above, in which the court concluded that the case should be remanded to the district court for calculation of prejudgment interest on obligations arising under the LEI Lease at the judicial rate, but leaving "undisturbed"

the findings and holdings of the district court concerning prejudgment interest on all other portions of the judgment rendered in favor of Travelers, including awards arising from the Krown Lease (A-133 to A-136).

Thus, the Fifth Circuit's discussion of prejudgment interest in connection with the Krown Lease was purely dictum that should not have been relied on by the district court to recalculate the rate of interest specified in a paragraph of its December 3, 1992 amended judgment that had already been affirmed by the Fifth Circuit. Moreover, the discussion in Travelers II relied on by the district court was, arguably, incorrect.[7]

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[7]Of course, there was no reason to challenge the Fifth Circuit's reading of Narcise v. Illinois Central Railroad, 427 So. 2d 1192 (La. 1983), since the court's statements concerning that case were purely dictum that, at the time, appeared to have no effect on the Fifth Circuit's mandate that left unaffected Paragraph 2 of the district court's December 3, 1992

The central holding of the Narcise case, made in response to a particular question certified to the Louisiana Supreme Court by the Fifth Circuit, was that "there can be liability in solido between a third party tortfeasor sued under Louisiana's codal provisions and an employer-railroad sued under [the Federal Employer's Liability Act]." Narcise v. Illinois Central Railroad, 427 So. 2d 1192, 1195 (La. 1983). Narcise in no way addressed the issue of whether a party, whose liability is based in tort, who is adjudged to be liable in solido for the obligations of another party, whose liability is based in contract, is also responsible in solido for prejudgment interest at a rate stipulated in the contract by the other party. To the extent that a court, as the Fifth Circuit did in this case, reads Narcise to mean that a party whose liability is based

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amended judgment.

in tort can be solidarily liable for pre-judgment interest at a contractual rate, it is unclear how such a reading could be reconciled with a statutory interest scheme that fixes different rates of interest based on the source of a party's liability. Compare La. Rev. Stat. Ann. § 13:4203 (West 1991) (legal interest payable on all judgments sounding in damages "ex delicto") with La. Civ. Code Ann. art. 2000 (West Supp. 1995) (when the object of performance is a sum of money, damages are measured by interest at contract rate agreed by the parties, or, in the absence of agreement, at the rate of interest fixed by La. Civ. Code Ann. art. 2924). Therefore, the Fifth Circuit's interpretation of Narcise is, at best, suspect.

Furthermore, even if (1) the Fifth Circuit's reading of Narcise was correct, and (2) there was some conflict between the Fifth Circuit's opinion concerning

prejudgment interest and the terms of the mandate issued by the Fifth Circuit, the district court still did not have the authority to violate the specific terms of the mandate and calculate the prejudgment interest owed by the Partnership in a manner other than that specified in Paragraph 2 of the December 3, 1992 amended judgment. In the event of a conflict between the text of a mandate or a judgment and the opinion accompanying the mandate or judgment, the mandate or judgment controls. As the Seventh Circuit Court of Appeals noted in a recent case: "Judicial opinions do not create obligations; judgments do. In the event of a conflict between the opinion and the judgment, the judgment controls." Eakin v. Continental Illinois National Bank & Trust Co. of Chicago, 875 F.2d 114, 118 (7th Cir. 1989) (citation omitted).

In this case, the text of the mandate issued by the Fifth Circuit on May 31, 1994 provides, in full:

J U D G M E N T

> This cause came on to be heard on the record on appeal and was argued by counsel.
>
> ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause holding the Liljebergs and various of the Liljeberg entities liable in solido to Travelers is affirmed in all respects, subject only to the following two exceptions: (1) To the extent that said judgment failed to award reasonable attorney's fees to Travelers, payable by some among the Defendants-Appellants/Cross-Appellees in solido, as to all matters in controversy other than the portion of the judgment resulting from liability for rent under the LEI leases, this cause is reversed and remanded for the District Court to determine such reasonable attorney's fees and to modify or supplement its judgment accordingly; and (2) to the extent that some of the pre-judgment interest awarded resulting from delinquencies in the rent accruing under the LEI lease, at a rate or rates other than as specified in article 2924 of the Louisiana Civil

> Code, this cause is reversed and remanded for the district court to recalculate pre-judgment interest in accordance with said code article, but only as to the portion of the award arising from the LEI leases; and to modify or supplement its judgment accordingly.
>
> IT IS FURTHER ORDERED that all costs of this appeal are to be taxed to defendants-appellants/cross-appellees (except St. Jude Hospital of Kenner, Louisiana, Inc.) in solido.
>
> April 20, 1994
>
> ISSUED AS MANDATE: May 31, 1994

(A-143 to A-144.) It is clear from the unambiguous text of this mandate that the district court was authorized to do only two things on remand: (1) award attorney's fees as to all matters in controversy other than the portion of the judgment attributable to the LEI Lease; and (2) recalculate prejudgment interest attributable to the LEI Lease in accordance with La. Civ. Code Ann. art. 2924. Since the mandate was clear and unambiguous, the district court did not have the authority

to interpret the mandate in light of the Fifth Circuit's opinion and recalculate prejudgment interest attributable to the Krown Lease in a manner inconsistent with Paragraph 2 of the December 3, 1992 amended judgment, which was affirmed in the Fifth Circuit's mandate. See Spearman v. J&S Farms, Inc., 755 F. Supp. 137, 140 (D.S.C. 1990) (a judgment that is clear and unambiguous must be given its plain meaning and consequent legal effect). See generally 49 C.J.S. "Judgments" § 436 at 868 (1947) ("A judgment, plain and unambiguous in its terms, may not be modified, enlarged, restricted, or diminished by reference to the opinion or decision of the court"); cf. Gurley v. Lindsley, 459 F.2d 268, 275 (5th Cir. 1972) (ordinary principles of construction apply to judgments); American Totalisator Co. v. Fair Grounds Corp., 3 F.3d 810, 813 (5th Cir. 1993) (where words of a contract are clear

and unambiguous, the contract's meaning is sought within the four corners of the document without resort to extrinsic evidence).

The Fifth Circuit, in Travelers III, then sanctioned the district court's error by, in effect, reinterpreting the unambiguous text of its mandate to comport with the allegedly conflicting language of the court's opinion in Travelers II. Thus, the Fifth Circuit committed the same error as did the district court--i.e., not applying the clear language of the prior mandate, which controlled over any possibly conflicting language contained in the opinion accompanying the mandate. Under the law of the case doctrine, the Fifth Circuit itself was bound in Travelers III by its earlier rulings in the case, as specified in the mandate. See Dickinson v. Auto Center Manufacturing Co., 733 F.2d 1092, 1097 (5th Cir. 1983)

("Under the 'law of the case' principle, a prior decision of this court . . . will be followed without re-examination, both on the remand to the district court and on subsequent appeals to this court"). If circumstances arose that cast doubt on the correctness of the law of the case as established in the mandate, the Fifth Circuit should have recalled and reformed its mandate, see Sparks v. Duval County Ranch Co., 604 F.2d 976, 979 (5th Cir. 1979) (en banc) (court's power to recall and reform a mandate even after its issuance is well established), aff'd on other grounds sub nom. Dennis v. Sparks, 449 U.S. 24 (1980), in accordance with the standards set forth in its local rules of procedure. See 5th Cir. R. 41.2 ("A mandate once issued shall not be recalled except to prevent injustice"); Masinter v. Tenneco Oil Co., 934 F.2d 67, 68 (5th Cir. 1991) ("We may recall the [earlier] man-

date . . . only 'to prevent injustice'"). As a result of its decision in Travelers III, the Fifth Circuit effectively recalled the mandate issued in Travelers II, despite never having made a finding that the mandate should have been recalled "to prevent injustice," in violation of its own local rules.

The Fifth Circuit's reinterpretation of the unambiguous language of the May 31, 1994 mandate is made even more troubling by the fact that only one of the three circuit judges who issued the original mandate participated in the panel that decided Travelers III. See nn. 4 and 5 above. As such, Travelers III can be seen as the decision of one panel of the Fifth Circuit effectively overruling the decision of another Fifth Circuit panel without having ordered the case to be reheard en banc, which cannot be done. See Girard v. Drexel Burnham Lambert, Inc., 805 F.2d

607, 610 (5th Cir. 1986) (absent an overriding Supreme Court decision or a change in statutory law, only the Fifth Circuit sitting en banc can overrule a decision by one panel of the court). In this respect, the panel's decision in Travelers III violates another one of the policies informing the law of the case doctrine (in addition to those cited in Christianson v. Colt Industries Operating Corp., supra, 486 U.S. at 816), namely the avoidance of "panel shopping." See Burger King Corp. v. Pilgrim's Pride Corp., 15 F.3d 166, 169 (11th Cir. 1994).

In sum, by calculating the amount of prejudgment interest owed by the Partnership at the contractual rate stipulated in the Krown Lease, the district court ignored an unambiguous mandate issued by the Fifth Circuit based on an erroneous statement of the law that was not controlling anyway. This was clearly a departure

"from the accepted and usual course of judicial proceedings," which was then sanctioned by the Fifth Circuit in its May 24, 1995 opinion (Travelers III) when the Fifth Circuit relied on the same incorrect, dictum statements from its opinion in Travelers II to justify the actions taken by the district court in violation of the Fifth Circuit's mandate (A-8 to A-11). As such, this Court has the authority under its powers of supervision to correct the errors made by the district court and the Fifth Circuit Court of Appeals in this case.

CONCLUSION

For all of the foregoing reasons, Petitioners respectfully request this Court to grant their Petition for Writ of Certiorari.

Respectfully submitted,

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Attorney for Petitioners

NO.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1995

ST. JUDE HOSPITAL OF KENNER, LOUISIANA, INC., ST. JUDE MEDICAL OFFICE BUILDINGS LIMITED PARTNERSHIP, and KROWN DRUGS, INC.,

Petitioners,

v.

THE TRAVELERS INSURANCE COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

APPENDIX

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TABLE OF CONTENTS

Page

Fifth Circuit Opinion dated May 24, 1995 in Travelers Insurance Co. v. St. Jude Hospital of Kenner, Louisiana, Inc., 56 F.3d 1386 (5th Cir. 1995) (Nos. 94-30636, 94-30639, 94-30665; unpublished) (Travelers III) A-1

District Court Order and Reasons dated August 13, 1992 in Travelers Insurance Co. v. Liljeberg Enterprises, Inc., 799 F. Supp. 641 (E.D. La. 1992) A-13

District Court Judgment in consolidated Case No. 90-1983 c/w 90-2601 entered August 18, 1992 . . . . . A-33

District Court Order and Reasons in consolidated Case No. 90-1983 c/w 90-2601 dated November 24, 1992 . . . . . A-51

District Court Amended Judgment in consolidated Case No. 90-1983 c/w 90-2601 entered on December 3, 1992 . . . . . A-78

Fifth Circuit Opinion dated November 26, 1993 in Travelers Insurance Co. v. Liljeberg Enterprises, Inc., 7 F.3d 1203 (5th Cir. 1993) (Travelers I) . . . A-96

TABLE OF CONTENTS (CONT'D)

Page

Fifth Circuit Opinion dated April 20, 1994 in Travelers Insurance Co. v. St. Jude Hospital of Kenner, Louisiana, Inc., 21 F.3d 1107 (5th Cir. 1994) (No. 92-9579) (Travelers II) A-122

Mandate issued by Fifth Circuit in Appeal No. 92-9579 dated May 31, 1994 . . . . . .A-140

District Court Order and Reasons in consolidated Case No. 90-1983 c/w 90-2601 filed October 21, 1994 . . . . . .A-145

District Court Second Amended Judgment in Case No. 93-173 filed November 3, 1994 . . . .A-157

U.S. COURT OF APPEALS
FILED
MAY 24 1995
CHARLES R. FULBRUGE III
CLERK

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 94-30636 c/w No. 94-30665
Summary Calendar

THE TRAVELERS INSURANCE COMPANY,

Plaintiff-Appellee,

VERSUS

ST. JUDE HOSPITAL OF KENNER, LOUISIANA, INC.,

Defendant-Appellant.

* * * * * * * * * *

c/w No. 94-30639
THE TRAVELERS INSURANCE COMPANY,

Plaintiff-Appellee,

VERSUS

ST. JUDE HOSPITAL, ET AL.,

Defendants,

ST. JUDE MEDICAL OFFICE BUILDING LIMITED PARTNERSHIP AND KROWN DRUGS, INC.,

Defendants-Appellants.

* * * * * * * * * *

ST. JUDE HOSPITAL, ET AL.,

Plaintiffs,

ST. JUDE MEDICAL OFFICE BUILDING LIMITED PARTNERSHIP,

Plaintiff-Appellant,

VERSUS

THE TRAVELERS INSURANCE COMPANY, ET AL.,

Defendants,

THE TRAVELERS INSURANCE COMPANY,

Defendant-Appellee.

Appeals from the United States District Court for the Eastern District of Louisiana (CA-93-173-I & CA-90-1983-I c/w 90-12601-I)

Before DUHE, WIENER, and STEWART, Circuit Judges.

PER CURIAM:[1]

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[1]Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

This is a consolidation of several appeals from a series of orders allowing Travelers Insurance Company to execute upon a money judgment against St. Jude's Hospital property. St. Jude mortgaged its hospital to Lifemark Hospitals, Inc. in 1983. Lifemark failed to timely reinscribe its mortgage in 1993 as required by law to preserve its rank. Meanwhile Travelers recorded a judgment against St. Jude thereby obtaining a judicial mortgage on the hospital.

In the various orders appealed, Travelers' judicial mortgage was recognized as superior in rank to the collateral mortgage of Lifemark, the court fixed the amount due by St. Jude, a writ of fieri facias issued to enforce Traveler's judgment, the court denied St. Jude's motion to vacate the writ and to enjoin the U.S. Marshal from executing the writ, the Marshal seized and sold the hospital,

and the court confirmed the Marshal's sale. We affirm in part and dismiss as moot in part.

I.

We first address St. Jude's motion to vacate the writ and to enjoin the Marshal from executing the writ and the order confirming the sale. The orders denying the motion to vacate writ and to enjoin the Marshal were issued October 21, a few days before the Marshal's sale on October 28, 1994. St Jude took no action to stay the sale and did not seek a suspensive appeal.

We hold that both the appeal of the orders denying vacation of the writ of fifa and denying an injunction against execution of the writ as well as the appeal of the confirmation order are moot. See In re Manges (Manges v. Seattle First Nat'l Bank), 29 F.3d 1034, 1042 (5th Cir. 1994) (fact that "centerpiece" of litiga-

tion has been irreversibly sold to third parties weighs heavily in favor of a finding of mootness). The Marshal sold the hospital to Lifemark, the second mortgagee and successful bidder, on October 28 pursuant to the writ. In connection with the seizure and sale, Travelers received from Lifemark satisfaction of its judicial mortgage. The court then entered an order confirming transfer of title. The appeals pertaining to the writ, auction, and confirmation of sale are moot.

II.

St. Jude's motion to rank mortgages sought to have Lifemark's collateral mortgage declared superior to Travelers' judicial mortgage. St. Jude complains that the judgment Travelers filed in the mortgage records could not have created a judicial mortgage because it lacked a principal amount. Travelers filed in the mortgage records on August 13, 1993 a copy

of an August 12, 1993 Amended Judgment which referred to indebtedness owed under a 1992 Amended Judgment. A few days later Travelers filed another copy of the August 12, 1993 Amended Judgment, this time attaching a copy of the referenced 1992 Amended Judgment and thereby providing a principal amount of the judgment debt. We agree with the district court that, by attaching the 1992 Amended Judgment to the 1993 Amended Judgment, it became possible for a third party to obtain from the mortgage records the amount of the debt secured by the recordation.

Lifemark ultimately reinscribed its collateral mortgage on April 11, 1994. Because of the failure of Lifemark to reinscribe its collateral mortgage until after Travelers had obtained its judicial mortgage, the court appropriately determined that Lifemark's mortgage was primed by the Travelers' mortgage. See American

Nat'l Ins. Co. v. Heller Financial, Inc., 989 F.2d 854, 856 (5th Cir. 1993) (recognizing that a mortgage not timely reinscribed cannot maintain its superior position).

St. Jude also contends that the recorded judgment did not specify an amount for attorneys' fees or costs and was therefore not actually final. Under Federal Rule 58, a creditor may obtain entry of a money judgment without delaying for taxing of costs. In April 1994 this Court awarded appellate costs and remanded for a fee award. In October 1994, before the Marshal's sale, the district court determined a reasonable fee. On November 3, 1994 the court entered its Second Amended Judgment nunc pro tunc as of October 20, 1994 fixing the amount of the judgment against St. Jude at $7,784,385.75 to include appellate costs and the fee award. Though attorneys' fees and costs

had not been awarded when the Travelers recorded its judgment, the fees and costs eventually awarded were properly included in the judgment nunc pro tunc.

We affirm the order denying St. Jude's motion to rank mortgages.

III.

St. Jude also contends that the district court overstated interest in the 1994 Second Amended Judgment, by applying the contractual rate in violation of the law-of-the-case doctrine. According to St. Jude, an earlier opinion of this Court approved prejudgment interest at the much lower judicial rate by leaving undisturbed a district court ruling restricting interest to the judicial rate. We disagree with this interpretation of our earlier decision.

In discussing prejudgment interest relating to the lease obligations, this Court generally agreed with Travelers and

approved 100% liability of St. Jude as solidary co-obligor with Krown on the contractual rate of interest. Travelers Ins. Co. v. St. Jude Hosp., No. 92-9579, slip op. at 6-9 (5th Cir. Apr. 20, 1994) ("Travelers II"). On the LEI lease, the panel was bound by Travelers I, a still earlier appeal in this case, requiring the judicial rate of prejudgment interest, but not so regarding the Krown lease:

> [I]n the issue of pre-judgment interest a dichotomy resulting from differences in the two different lease forms — LEI and Krown — is produced . . . . Travelers I contains a direct finding and holding on pre-judgment interest [which] is applicable only to LEI lease provisions.
>
> . . . [W]e are constrained by the law of the case doctrine to conclude today that pre-judgment interest . . . under the LEI leases should have been calculated in accordance with article 2924 of the Louisiana Civil Code [i.e., the judicial rate]. . . .
>
> Not so, however, for calculating pre-judgment interest [under] the Krown lease . . . . We therefore leave undisturbed the findings and holdings of the

> district court concerning pre-judgment interest on all portions of the judgment rendered in favor of Travelers other than the portion thereof attributable to the LEI leases. These unaffected portions include, without limitation, awards arising from or connected with the Krown lease.

Travelers II at 7-9 (footnotes omitted).

We note a discrepancy in Travelers II when we delve into that "undisturbed" ruling, which is the district court's 1992 Amended Judgment. The district court had found St. Jude solidarily liable for the Krown lease debt, principal and interest, "except that St. Jude . . . shall be solidarily liable with Krown . . . for interest accruing on the principal amount only to the extent of the applicable judicial rate [for prejudgment interest]." 1992 Am. J. at 2 (emphasis added). So "leaving undisturbed" this ruling (holding St. Jude liable for only the judicial rate on the Krown obligation) is incongruent with adopting Travelers' position on the Krown

prejudgment interest obligation (advocating the contractual rate).

We resolve this discrepancy by interpreting Travelers II to mean that Travelers is entitled to the contract rate of prejudgment interest regarding the Krown lease obligations. Travelers II explicitly embraced Travelers' position. See Travelers II at 6-7 (noting Travelers' position that defendants are liable for "all unpaid rent and interest at the contract rate" and concluding that "Travelers is correct"). We find this expression by the panel more compelling than its reference to "leaving undisturbed" a ruling alluded to but not expressly explained. Thus the district court correctly observed that this Court had approved Travelers' entitlement to collect the contract rate of interest on the Krown lease. See Order & Reasons of Oct. 21, 1994 at 4-5.

IV.

The judgment of the district court is affirmed in part, regarding the order denying St. Jude's motion to rank and the Second Amended Judgment fixing the amount of the indebtedness of St. Jude. We dismiss as moot the appeals taken from the order denying St. Jude's motion to vacate writ and to enjoin the Marshal from executing the writ and from the order confirming the sale.

AFFIRMED in part, DISMISSED in part as moot.

TRAVELERS INSURANCE COMPANY

v.

LILJEBERG ENTERPRISES, INC.

Civ. A. No. 92-58.

United States District Court,
E.D. Louisiana.

Aug. 13, 1992.

ORDER AND REASONS

MENTZ, District Judge.

Before the Court is the Motion for Summary Judgment of Travelers Insurance Company ("Travelers") seeking to recover rents due under two lease contracts from defendant, Liljeberg Enterprises, Inc. ("LEI"). Having reviewed the record, memoranda of counsel, exhibits and the law, the Court finds that summary judgment is appropriate and grants the motion by Travelers.

FACTS

The facts material to the execution and operation of these leases are not in dispute. LEI initially entered into a

lease of space in the St. Jude Medical Office Building ("the Building") on May 1, 1985. In this "First Lease", LEI leased 11,893 square feet of space on the seventh floor of the building from St. Jude Medical Office Building Limited Partnership ("Partnership") for a term of ten years, commencing August 1, 1985 and ending July 31, 1995, for a basic monthly rental of $14,866.25. Pursuant to this First Lease, the Partnership was authorized to grant a mortgage or other security device with respect to the Building to an "Institutional Mortgagee." The definition of "Institutional Mortgagee" provided in the First Lease includes insurance companies, such as mover, Travelers.

On October 10, 1985, Travelers loaned the Partnership the sum of $25 million and, in consideration thereof, the Partnership executed and delivered to Travelers a promissory note dated as of that

date, in the principal amount of $25 million bearing interest at the rate of 11 3/4% per annum until paid. To secure payment of the obligations represented by the note, the Partnership granted to Travelers, among other security devices, a mortgage on the Building and a Collateral Assignment of Leases, pursuant to which the Partnership assigned to Travelers, at least, the rents to be paid on all leases for space in the building including the First Lease. This loan, and accompanying mortgage, made Travelers the Institutional Mortgagee referenced in the First Lease.

On May 1, 1987, LEI entered into a Second Lease by which LEI leased from the Partnership 1,800 square feet located on the seventh floor of the Building, and adjacent to the space leased by LEI in the First Lease. This Second Lease was subject to the Collateral Assignment of

Leases. The form of the Second Lease is identical to that of the First Lease.

The Partnership failed to meet its obligation to pay timely the installment due on its indebtedness to Travelers for the month of March, 1990 and the installments due for each month thereafter. In June, 1990, Travelers filed a lawsuit against the Partnership and other defendants seeking, among other things, the seizure and sale by judicial process of the Building. The Building was sold at public auction of October 18, 1991 to Travelers, the sole bidder.

Section 20(g) of the First and Second Leases provides as follows:

> [I]n the event of the termination of this Lease or of any succeeding lease made pursuant to the provisions of this clause prior to the expiration date, Lessee will enter into a new lease of the Leased Premises with the Institutional Mortgagee for the remainder of the term of this Lease, effective as of the date of such termination, at the rent and additional rent and

> upon the covenants, agreements, terms, provisions and limitations herein contained provided such Institutional Mortgagee makes written request upon the Lessee for such new lease within thirty (30) days from the date of such termination.

Acting pursuant to these provisions, Travelers delivered to LEI two proposed leases on November 15, 1991. These two leases, respectively, matched the First and Second Leases which terminated upon the sale of the Building at public auction, except that the dates of execution were changed, Travelers was substituted for the Partnership as Lessor and the leases were executed by James Morgan, an officer of Travelers.

LEI has since refused to sign the proposed leases and has failed to pay any of the rental due under the proposed leases.

By this motion, travelers seeks summary judgment declaring the two proposed leases valid and enforceable by Travelers

and awarding Travelers all rentals due from the date the proposed leases were executed through the end of their respective terms. Travelers claims to be entitled to the entire amount of rents due under the contract pursuant to an acceleration clause found in Section 22 of the leases.

ANALYSIS

Summary judgment shall be granted when, "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c).

[1] The lease contracts are to be given legal effect according to the parties' true intent, which must be determined by the words of the contract where they are clear, explicit and lead to no

absurd consequences. Ransom v. Camcraft, Inc., 580 So.2d 1073, 1076 (La.App. 4th Cir.1991). The disposition of this motion depends upon the interpretation of three clauses of the First and Second Leases and their successors, tendered by Travelers to LEI. First, Travelers rights, as "Institutional Mortgagee," are governed by Section 20 of the leases; that Section must be interpreted to determine the validity of Travelers tendered leases. Second, Travelers right to acceleration of the rents under the leases depends on interpretation of Section 22 of the leases. Finally, the parties are at odds as to the term of the second proposed lease—also a matter of contract interpretation. "As long as the contract as a whole is coherent, ambiguities can be resolved as a matter of law without looking beyond the four corners of the document." Huggs,

Inc. v. LPC Energy, Inc., 889 F.2d 649, 651 (5th Cir.1989).

Validity of Travelers' Tendered Leases

[2] LEI contends that Travelers status as Institutional Mortgagee was extinguished along with its mortgage by operation of the judicial sale of the Building on October 18, 1991. Section 20 of the leases, which governs the rights of the Institutional Mortgagee, however, specifically provides for the event of a foreclosure by the Institutional Mortgagee. Sub-sections (f) and (g) provide as follows:

> (f) any Institutional Mortgagee or third person purchaser at a foreclosure sale may become the legal owner and holder of this Lease by foreclosure of the Institutional Mortgage or as a result of the assignment of this lease in lieu of foreclosure, whereupon such Institutional Mortgagee or third person purchaser shall immediately become and remain liable under this lease except that, as to accrued amounts payable by Lessor to

> Lessee under this Lease as of such date, the Lessee shall have no recourse against the Institutional Mortgagee; and (g) in the event of the termination of this Lease or of any succeeding lease made pursuant to the provisions of this clause prior to the expiration date, Lessee will enter into a new lease of the Leased Premises with the Institutional Mortgagee for the remainder of the term of this Lease, effective as of the date of such termination, at the rent and additional rent and upon the covenants, agreements, terms, provisions and limitations herein contained provided such Institutional Mortgagee makes written request upon the Lessee for such new lease within thirty (30) days from the date of such termination.

The conjunction joining the two subsections combines the right of the Institutional Mortgagee to "become the legal owner and holder of this Lease by foreclosure of the Institutional Mortgage" with the further right to compel the lessee to enter into new leases after such a termination of the old lease.

It is just such a procedure that Travelers utilized to continue into effect

the First and Second Leases. Where the contract spells out specifically what the Institutional Mortgagee must do following a foreclosure of its mortgage, it cannot be said that the foreclosure extinguishes the Institutional Mortgagee's rights beyond that event.

LEI next contends that the parties to the First and Second Leases did not intend to stipulate such a benefit for a third person. LEI's basis for this assertion is that Travelers did not hold its mortgage on the Building at the time the First Lease was made. It cannot be disputed that the lease intends to provide benefits to some third party—an unnamed Institutional Mortgagee. The relevant consideration, however, is whether the third party beneficiary can be determined on the date it is to receive the benefit. Andrepont v. Acadia Drilling Co., 255 La. 347, 231 So.2d 347, 352 (1969). Travelers was

identifiable well in advance of its exercise of the rights stipulated to it by the leases. Defendant further argues that Travelers failed to manifest its intention to avail itself of the stipulated benefit as is required by La. Civil Code Art.1978. Here, the lease provides that the mechanism by which Travelers is to avail itself of the benefit of issuing new leases to LEI is to tender such leases within thirty days of the termination of the old leases. By doing just that, Travelers sufficiently manifested its intention to avail itself of the benefit before the benefit could possibly be withdrawn.

Having determined that Travelers, as Institutional Mortgagee, was entitled under both the First and Second Leases to compel LEI to "enter into a new lease of the Leased Premises with the Institutional Mortgagee for the remainder of the term of [the old leases]," the new leases became

effective as of the date of termination of the old leases. Travelers' tender of such new leases on November 15, 1991 effectively continued into effect in its name the leases previously entered into between the Partnership and LEI through the end of their terms.[1]

This Court finds, therefore, that the two leases tendered by Travelers to LEI on November 15, 1991 are valid leases and are enforceable by Travelers against LEI.

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[1]Defendant asserts that Travelers did not tender leases in compliance with Section 20(g) because the leases tendered by Travelers carried the same effective date as the original leases instead of October 18, 1991, the date those original leases terminated. Nowhere do the lease provisions state that the tendered leases should begin anew from the date of termination. Section 20(g) merely calls for a continuation of the effectiveness of the new leases from the time the original leases left off.

Application of the Acceleration Clause

[3] Turning to the manner in which Travelers may enforce the leases, Travelers has requested payment of all unexpired rent payable under the leases, on an accelerated basis. The lease provision allowing acceleration of the rents is found at subsection (g) of Section 22. Section 22 provides:

> **22. The following shall, at Lessor's option, constitute a default by Lessee under the terms of this Lease:**
>
> (b) Failure by Lessee to pay the rent provided herein or any other payment required herein to be made by Lessee hereunder or any part thereof, which default shall continue after ten (10) days written notice thereof by Lessor to Lessee;
>
> (g) Any reduction, revocation or suspension of Lessee's active medical staff membership and or clinical privileges at St. Jude Hospital of Kenner, La., Inc. (hereinafter referred to as "Hospital"); or, if Lessee is a professional corporation, the reduction, revocation or suspension of the active medical staff membership and/or clinical privileges at Hospital of any physi-

cian employee, agent, or shareholder of Lessee. All physicians employed by or holding stock in Lessee shall be members of the active medical staff of Hospital. For the purpose of this Lease, a reduction, revocation or suspension of active medical membership or clinical privileges shall be deemed to have occurred when the physician involved had either (1) failed to request a hearing by the judicial review committee of Hospital pursuant to Hospital's Medical Staff Bylaws and Rules and Regulations, or (2) received an adverse final decision by the Board of Directors or suspension of his or her active medical membership or clinical privileges. In said events or any of them, Lessor may, at Lessor's option, without any notice or putting in default, (1) proceed for past due installments of rent only, reserving its right to proceed later for the remaining installments; or (2) declare all of the unpaid installments of rent at once due and exigible, and the whole thereof shall become and be immediately due and payable anything herein to the contrary notwithstanding, and to proceed to enforce its legal remedies hereunder, or (3) cancel this Lease, and immediately expel Lessee, without, however, waiving Lessor's right to collect all installments of rent and all other payments due or owing for the period up to the time Lessor regains occu-

> pancy, including costs, attorney fees, and for a judgment of condemnation without the necessity of a formal suit or judgment of condemnation and the date of taking under this paragraph shall then be deemed the date agreed to under the terms of said agreement or stipulation.

It is the contention of defendant that acceleration of rents applies only where the default relied on by Lessor is that set forth in the beginning of subsection (g), i.e. reduction, revocation or suspension of active medical membership or clinical privileges at St. Jude Hospital, in that the acceleration clause immediately follows this provision. A reading of the acceleration clause shows, however, that it is not restricted to subsection (g). Lessor is given the option of proceeding for "past due installments of rent only . . . or (2) declare all of the unpaid installments of rent at once due and exigible . . ." Contemplating the event of past due payments, which is defined as

a default in subsection (b), the acceleration clause is clearly intended to have effect beyond the potential loss of staff privileges.[2]

The acceleration clause is therefore available as a remedy to the lessor for any of the events of default listed in Section 22.

Term of the Second Lease

[4] Travelers calculated its damages on the basis of a ten year term applying to the Second Lease, as adopted in the tendered second lease. The term of the original Second Lease was stated in Section 1(A)(5) as follows:

> The term of this Lease shall be Ten (10) years,

---

[2]Furthermore, Louisiana law provides that a lessor is given the option set forth in 22(g) simply by operation of law, without regard for contractual provisions. See e.g. Shreveport Plaza Association Limited Partnership v. L.R. Resources, II, 557 So.2d 1067, 1071 (La.App.2d Cir. 1990).

commencing on the 1st day of May, 1987, (Commencement Date) and ending on the 30th day of

April, 1992, unless sooner terminated as herein

provided.
Section 1(A)(6) further provides:

Basic Annual Rent: 27,000.00

Lease Years: 1987, 1988, 1989, 1990, 1991, 1992

Basic Monthly Rental: $2,250.00

There obviously exists a discrepancy as to the ending date of the lease. The stated term of "Ten (10) years" coincides with neither the ending date of April 10, 1992 or the listing of Lease Years in Section 1(A)(6).

Given the parties' endeavor to specify an ending date and to list the specific years to which the lease would apply, both of which are in agreement, the Court determines that the lease term was intended

to run through April 30, 1992, or five years.[3]

COMPUTATION OF RENT

In support of its motion, Travelers filed the affidavit of Ralph Dazet, a certified public accountant. Mr. Dazet testified that he had analyzed the leases at issue and had computed the total rents due under the leases. The defendant's only objection to the computations of Mr. Dazet related to the effective date of the tendered leases, which this Court, as stated above, has found to be correct as applied in the computations. An adjustment must be made in Mr. Dazet's computations, however, as to the length of the second lease. This Court found the second

---

[3]This interpretation is further supported by the letter of tenant estoppel executed and submitted by LEI to Travelers on May 1, 1987, the same day as the execution of the Second Lease. That letter also provides that the Lease terminates on April 30, 1992. Travelers Reply Memorandum, Exhibit 2.

lease to have been for a term of five years, not ten years as applied by Mr. Dazet in his computations. Therefore, the Court finds the total rents due under the first lease to be $732,603.81, and the total rents due under the second lease to be $13,483.14, for a combined total of $746,086.95.

CONCLUSION

Based on the foregoing interpretations of the lease contracts, this Court finds that Travelers is entitled to an award of accelerated lease payments from LEI under the two leases it has tendered to LEI as computed above.

Accordingly,

IT IS ORDERED that:

1. Plaintiff's, Travelers Insurance Company's, Motion for Summary Judgment is GRANTED;

2. A judgment be entered in favor of plaintiff, Travelers

Insurance Company, and against the defendant, Liljeberg Enterprises, Inc., for total rent payments due under the leases in the amount of $746,086.95, together with legal interest from the date of judgment. All costs of these proceedings are to be borne by the defendant.

U.S. DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
FILED AUG 18 1992
LORETTA G. WHYTE
CLERK

DATE OF ENTRY AUG 18 1992

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

THE TRAVELERS INSURANCE COMPANY

VERSUS

ST. JUDE HOSPITAL OF KENNER, LOUISIANA, INC., ET AL.

CIVIL ACTION
NO. 90-1983 c/w
NO. 90-2601

SECTION "I" (6)

JUDGMENT

Considering the answers to the jury interrogatories propounded by the Court, and consistent with this Court's prior minute entries dated February 21, 1991 and April 11, 1991, the Partial Final Judgment dated September 24, 1990, the Court's Order of July 30, 1991 granting the Motion for Directed Verdict of plaintiff, Travelers Insurance Company, the Court's Order

and Reasons of August 17, 1992, and the Court's Order of August 13, 1992,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Judgment be, and the same hereby is, rendered herein favor of the Travelers Insurance Company, the plaintiff in this action and against the defendants, St. Jude Medical Office Buildings Limited Partnership, Liljeberg Enterprises, Inc., Krown Drugs, Inc., John A. Liljeberg and Robert Liljeberg, as follows:

1. IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Judgment be, and the same hereby is, rendered herein favor of the Travelers Insurance Company, the plaintiff in this action, and against St. Jude Medical Office Buildings Limited Partnership and Liljeberg Enterprises, Inc., each to be bound solidarily in the principal amount of $773,058.00, together with accrued interest on this Amount through

August 15, 1991 in the amount of $497,164.00, which interest continues to accrue at the rate of $383 per diem from and including August 16, 1991, until paid.

2. IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Judgment be, and the same hereby is, rendered herein favor of the Travelers Insurance Company, the plaintiff in this action, and against St. Jude Medical Office Buildings Limited Partnership and Krown Drugs, Inc., each to be bound solidarily in the principal amount of $1,699,526.00 together with accrued interest on this Amount through August 15, 1991 in the amount of $2,688,603.00, which interest continues to accrue at the rate of $2,404 per diem from and including August 16, 1991, until paid.

3. IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Judgment be, and the same hereby is, rendered herein favor of the Travelers Insurance Company, the plaintiff

in this action, and against St. Jude Medical Office Buildings Limited Partnership, Liljeberg Enterprises, Inc., John A. Liljeberg, and Robert Liljeberg, each to be bound solidarily in the principal amount of $175,000, together with judicial interest as allowed by law, until paid.

4. IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Judgment be, and the same hereby is, rendered herein favor of the Travelers Insurance Company, the plaintiff in this action, and against St. Jude Medical Office Buildings Limited Partnership in the principal amount of $214,942.00, together with judicial interest as allowed by law, until paid.

5. IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Judgment be, and the same hereby is, rendered herein favor of the Travelers Insurance Company, the plaintiff in this action, and against Liljeberg Enterprises, Inc. in the principal amount

of $1,230,091.00, together with accrued interest on this principal amount through August 15, 1991 in the amount of $177,580.00, which interest continues to accrue at the rate of $424.00 per diem from and including August 16, 1991, until paid.

6. IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Judgment be, and the same hereby is, rendered herein favor of the Travelers Insurance Company, the plaintiff in this action, and against Krown Drugs, Inc. in the principal amount of $1,884,743.00, together with accrued interest through August 15, 1991 in the amount of $508,965.00, which interest continues to accrue at the rate of $1,312 per diem from and including August 16, 1991 until paid.

7. IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Judgment be, and the same hereby is, rendered herein favor of the

defendant, St. Jude Hospital of Kenner, La., Inc., and against the plaintiff, the Travelers Insurance Company, dismissing with prejudice plaintiff's claim for declaratory relief seeking recognition of the existence of a servitude in favor of Parcel "B-1", Loyola Tract (Formerly Monroe Tract) University City Subdivision, City of Kenner, Parish of Jefferson, State of Louisiana, burdening or encumbering the underground sewerage and water drainage system located on Parcel "A", Loyola Tract (formerly Monroe Tract), University City Subdivision, City of Kenner, Parish of Jefferson, State of Louisiana.

8. IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Judgment be, and the same hereby is, rendered herein favor of the defendants, St. Jude Medical Office Building Limited Partnership, The Travelers Insurance Company, and Travelers Realty Investment Company, and against the plain-

tiff, St. Jude Hospital of Kenner, La., Inc., dismissing with prejudice all claims in case number 90-2601.

9. IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Judgment be, and the same hereby is, rendered herein favor of the defendants, St. Jude Hospital of Kenner, La., Inc., St. Jude Medical Office Building Limited Partnership, Liljeberg Enterprise, Inc., John A. Liljeberg, Robert Liljeberg, and Krown Drugs, Inc., and against the plaintiff, The Travelers Insurance Company, dismissing with prejudice all of plaintiff's fraudulent misrepresentation claims and demands.

10. IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Judgment be, and the same hereby is, rendered herein favor of the defendant, St. Jude Medical Office Building Limited Partnership, and against the plaintiff, The Travelers Insurance Company, dismissing with prejudice plain-

tiff's claim for recovery of the outstanding balances due under the October 10, 1985 promissory note executed by St. Jude Medical Office Building Limited Partnership in favor of the Travelers Insurance Company in the principal amount of $25,000,000.00.

11. IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Judgment be, and the same hereby is, rendered herein favor of the defendant, Liljeberg Enterprises, Inc., and against the plaintiff, The Travelers Insurance Company, dismissing with prejudice all claims and demands of breach of contractual obligations under the mortgage and collateral assignment of leases.

12. IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Judgment be, and the same hereby is, rendered herein favor of the defendant, Liljeberg Enterprises, Inc., and against the plaintiff, The Travelers Insurance Company, dismissing with preju-

dice all claims and demands for negligent misrepresentation.

13. IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Judgment be, and the same hereby is, rendered herein favor of the defendant, Krown Drugs, Inc., and against the plaintiff, The Travelers Insurance Company, dismissing with prejudice all claims and demands for negligent misrepresentation.

14. IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Judgment be, and the same hereby is, rendered herein favor of the Travelers Insurance Company, the plaintiff in this action, recognizing that the certain Collateral Assignment of Leases dated October 10, 1985, executed by St. Jude Medical Office Buildings Limited Partnership in favor of the Travelers Insurance Company, and recorded in COB 1344, folio 179 in the Conveyance Records for the Parish of Jefferson, State of Louisiana is

valid and enforceable in accordance with its terms.

15. IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Judgment be, and the same hereby is, rendered herein favor of the Travelers Insurance Company, the plaintiff in this action, recognizing that the certain Real and Chattel Mortgage dated October 10, 1985, executed by St. Jude Medical Office Buildings Limited Partnership in favor of the Travelers Insurance Company, and recorded in MOB 1314, folio 278 in the Mortgage Records for the Parish of Jefferson, State of Louisiana is valid and enforceable in accordance with its terms and encumbers, among other movable and immovable property, (i) the improvements and (ii) the furniture, fixtures and equipment owned by St. Jude Medical Office Building Limited Partnership, which are located at the St. Jude Medical Office Building and

also the following which were removed from the St. Jude Medical Office Building:

5 Drapes with sheers
5 Mini blinds
5 Curtain rods, travis and sheers
2 Napoleon framed pictures (Graphites)
2 Burgundy love seats (Leather)
4 Chairs (Leather)
2 Glass entrance doors (etched LEI)
1 Large door frame unit
1 Wood panel door (Closet door jam unit)
1 Wood panel door with door jam unit (Entrance to executive area)
1 Secretary desk with return
1 Secretary chair (Fabric)
1 Set of molding strip units
1 Set of base board units
2 Omega phones
1 Calculator
1 IBM Wheelwriter typewriter
2 Secretary pedestal desks with returns (glass tops)
1 Leather sofa
3 Leather chairs
2 Steno chairs
6 Silk flower arrangements
4 Stackable desk trays
1 Answer machine
6 Curtain panels
5 Sheer panels
5 Venetian blinds
2 Trash cans
1 2-drawer lateral file
1 Carpet protector
Assorted planters and plants
1 Executive desk
1 Credenza
2 Sheers
1 Set of base board units
2 Fabric love seats (black)

1 Lamp table
1 Set of molding strip units
1 Foyer throw rug
1 Framed picture (Waterloo) Napoleon
2 Secretary desks with returns
1 Secretary chair
2 Wood and fabric arm chair
7 Framed pictures
1 Long hall carpet runner (orange and beige)
1 Executive desk
2 Sets of drapes
3 Mini blinds-rods
1 Set of molding strip units
1 Carpet (burgundy with beige edge)
2 Sheers
1 Louisiana pelican picture(framed)
1 Fair Grounds picture (framed)
2 Panel doors with door jam unit
1 Executive desk chair (blue leather)
3 Sets of curtains
3 Sheers
3 mini blinds
1 set of base board units
3 frame panel doors with door jam units
1 42" Zenith television
2 plywood sliding doors and top in closet
1 refrigerator - ERS 250/255 #50704617
1 set of molding strip units
1 45" television
2 leather sofa
5 leather chair
1 ottoman
1 credenza with glass buffet
1 writing desk (claw foot)
2 wood cabinet
1 VCR
1 jacuzzi unit with slide away marble unit and movable steps
2 set of sheers - curtains
2 mini blinds

2 throw rugs
3 striped bath benches
2 panel doors with door jam units
2 brass shower heads with controls
1 glass and wood trim mirror
1 brass faucet unit
2 wood panel closet doors with shelving
1 19" Panasonic color television #CTJ1941R
4 sets of panel door units (slide out)
1 commode (beige) (Kohler)
1 executive desk
1 brass basket (firewood holder)
1 brass and glass fireplace front
1 credenza
1 executive chair (leather)
1 set of brass fireplace tools with stand
12 wood panel units (6 upper, 6 lower)
8 wood panel units (window treatment)
2 sets of chair molding units (lengths)
2 sets of wood base board units (lengths) and molding strip units
2 panel doors with door jam units
1 round brass and glass table
1 Kenmore compact refrigerator #41107485
3 wood cabinet with drawers
1 wood base with blue granite top
2 stereo speakers (Boze)
1 stereo unit MOO #GXR66
1 turntable
1 compact disc unit
1 glass and metal cabinet
1 wood shelving closet unit
1 round table
4 upholstered chairs (leather)
1 blue sofa (leather)
1 blue lounge chair (leather)
2 wood chairs

2 glass top end table
2 brass lamp
1 miscellaneous china and crystal
24 burgundy arm chairs
2 oversize burgundy chairs (leather)
1 12' wood credenza
1 round wood pedestal
4 wood panel doors with door jam units
2 wood entrance doors with door jam unit trim 4'x8' - 2 1/4 inch thick
1 wood bar unit with brass rail
1 wood bar unit rear with side unit and overhead removable panels attached
14 wood panel (solid units)
9 wood panel (window units)
9 wood sills
12 curtains; sheers; rods
12 mini blinds
2 wooden closet shelves
1 brass bar sink
1 brown commode (Kohler)
1 beige carpet
7 wood panels (upper and lower units)
1 chair rail trim units
1 set of upper & lower trim units
4 brass floor door stops
1 12' wooden credenza
2 wood and fabric arm chairs
1 wooden framed print of "New Orleans" picture
1 burgundy carpet
1 brown wood trim mirror
2 wood panel doors with door jam units
1 Canon fax machine
1 Omega phone
3 Wang workstations
1 Daisy printer
1 Band printer
1 disk drive
1 CPU
1 minute man

3 chairs
1 2-drawer lateral file
7 steelcase 4-drawer files
1 phone used for fax
2 battery packs
1 drop in/slide out garbage disposal unit
1 refrigerator
1 Thermadore dishwasher
1 slide in self-contained cook top and oven unit
1 microwave oven combo unit with wood casing
1 stainless steel hood
1 double sink
1 19" Mitsubishi television
2 counter tops
16 wood kitchen cabinets
2 wood panel door & door jam unit
2 wood cabinet doors
1 throw carpet
1 brass toilet paper holder
1 refrigerator (Hot Point)
1 stereo sound system & speaker
1 sofa (fabric)
2 chair (fabric) (Kimball)
8 chairs (brown fabric; roller)
6 chairs (fabric; wood base)
1 base board unit
1 file cabinet (2 drawer)
3 bookcase unit
1 double sink
1 refrigerator
3 set of books; So. 2d Rep. V. 1-550
1 set of books; La.R.S.
1 set of books; La.C.C.
1 set of books; La. C.P.
1 set of books; La.C.C.P.
1 set of books; La.Const.
1 set of books; Index to LSA
1 set of books; Index to La. Digest (1st Ed.)
2 mini blinds
5 wood cabinet unit

1 wood cabinet top unit
1 granite counter top
2 wood cabinet lower unit
3 wood panel door with door jam unit
2 mini blinds
2 set of drapes and sheers
1 set of upper and lower trim
1 corner cabinet wood
12 granite panel
8 panel trim unit
8 wood panel unit upper and lower
4 wood panel column unit
4 wood panel ceiling trim unit
860' metal stud (20 gauge)
74 sheetrock
10 flag pole
4 wood credenza
1 wood file cabinet
3 lounge chair
19 steelcase chair
16 Kimball chair
3 reception chair
1 office chair
52 vinyl wallpaper (roll)
5 carpet (roll)
1 drill press
1 tool chest and assorted tools
1 vacuum cleaner
17 phones
1 Pitney Bowes postage machine
2 check protectors
3 4-drawer metal files
3 2-drawer metal files
1 fire-proof file
3 steelcase 4-drawer lateral files
2 8' metal shelf units
1 etagere
2 postage scales
1 paper cutter
6 stackable chairs
1 upholstered chair
1 dressing table
1 calculator
1 desk lamp

5 framed prints
1 Canon copier
4 Omega phones
4 calculators
6 steno chairs
1 terminal display table
1 typewriter table
2 credenza
2 exec. pedestal desk with returns (glass tops)
4 steelcase 4-drawer lateral files
2 secretary pedestal desk with return (glass tops)
4 framed floral prints
1 Wang workstation
1 bottled water dispenser
1 small refridgerator [sic]
1 coffee pot
1 3-shelf cart
2 silk arrangements
2 oil paintings from Kurt Schoen
3 data binder hanging files
1 PC -printer - CPU - surge protector
6 carpet protectors
2 venetian blinds
7 trash cans
20 stackable desk trays
Assorted live plants and arrangements
1 folding table
1 Xerox copier
1 time clock
1 Omega phone
1 calculator
1 2-drawer lateral file
1 credenza
1 conference top desk
1 computer table
1 PC - printer - CPU - surge protector
4 framed prints
1 leather desk chair
1 leather sofa and chair
1 storage cabinet

2 lamps
2 chairs
1 coat rack
2 curtains with valance
2 venetian blinds
1 carpet protector

New Orleans, Louisiana, this *17th* day of August, 1992.

/s/ Henry A. Mentz, Jr.
UNITED STATES DISTRICT JUDGE

CLERK'S OFFICE
A TRUE COPY
OCT 29 1992
/s/ [Signature not Legible]
Deputy Clerk, U.S. District Court
Eastern District of Louisiana
New Orleans, La.

DEFENDANT'S
EXHIBIT
H

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

TRAVELERS INSURANCE CO. CIVIL ACTION

VERSUS NO. 90-1983
c/w 90-2601

ST. JUDE HOSPITAL OF KENNER, LA., INC., ET AL SECTION "I" (6)

ORDER AND REASONS

Before the Court are plaintiff's motion to amend or alter the judgment and defendants' motion for a new trial or in the alternative, to alter or amend the judgment.

I. DEFENDANTS MOTION FOR NEW TRIAL OR IN THE ALTERNATIVE, TO ALTER OR AMEND THE JUDGMENT

Defendants, St. Jude Hospital of Kenner, Louisiana, John A. Liljeberg, Jr., Robert Liljeberg, Liljeberg Enterprises, Inc., Krown Drugs, Inc. and St. Jude Medical Office Building Limited Partnership, moved for a new trial or, in the alternative, for an order to alter or amend the

judgment entered by this Court on August 18, 1992. The judgment was rendered on the basis of the jury verdict form, as well as this Court's Order and Reasons of August 17, 1992.

1. Motion for New Trial

Defendants seek to amend the Judgment to correct a number of alleged errors of law and fact that defendants argue were made by the jury and this Court. Defendants do not specify which of the alleged errors entitle them to a new trial as opposed to an amendment of the judgment. A motion for a new trial, governed by Fed.R.Civ.P.59(a), is to be granted only if it presents "controlling law or facts" which "compel" a change in the judgment, and this high standard cannot be satisfied by evidence that a party elected to withhold during the trial. Agola v. Hagner, 678 F.Supp. 988, 991 (E.D.N.Y. 1987). Nor can Rule 59 be used to present arguments

which could have been made before the judgment was issued. Federal Deposit Insurance Corp. v. Meyer, 781 F.2d 1260, 1268 (7th Cir. 1986). A new trial is only available in a case where the movant has shown that the alleged error has affected its "substantial rights" and that denial of the motion would result in a miscarriage of justice. Kehm v. Procter & Gamble Co., 580 F.Supp. 890, 897 (N.D.Iowa 1982); Ward v. San Jose, 737 F.Supp. 1502, 1513 (N.D.Cal. 1990).

This Court denies defendants' motion for a new trial on the basis that none of the errors alleged warrant a second trial of any of the issues previously tried and decided by the jury in this lawsuit. Any error that has been made in incorporating the jury's and this Court's findings into the judgment can be corrected without the necessity of a new trial.

2. Motion to Alter or Amend the Judgment

The parties agree that Paragraphs 5 and 6 of the judgment should be amended. They concur that the awards to Travelers, as set forth in those paragraphs, against LEI and Krown for rents due under their leases do not take into account the fact that the leased property was sold at judicial sale on October 18, 1991. As a result, LEI and Krown do not owe rent for the period following the judicial sale. Therefore, paragraphs 5 and 6 of the judgment will be amended as follows, to conform to the evidence presented at trial relating to the amounts of rents due from June 1990 through the October 18, 1991 judicial sale:

> 5. IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Judgment be, and the same hereby is, rendered herein in favor of the Travelers Insurance Company, the plaintiff in this action, and against Liljeberg Enterprises, Inc. in the principal amount of $484,004.50, together with interest accruing from June 1, 1990

until paid at the rate of eleven percent compounded monthly.

6. IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Judgment be, and the same hereby is, rendered herein in favor of the Travelers Insurance Company, the plaintiff in this action, and against Krown Drugs, Inc. in the principal amount of $597,261.57, together with interest accruing from June 1, 1990 until paid at the rate of twenty percent compounded monthly.

MOB argues that its liability with respect to paragraphs 1 and 2 of the judgment derives, in each instance, from the tort of negligent misrepresentation and not from the contracts. As a result, MOB contends that interest should run against MOB at the legal interest rate and not any contractual interest rate.

The Court agrees that MOB is not bound by the interest charges stipulated in the Krown lease. Paragraph 2 is, therefore to be amended to read as follows:

2. IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Judgment

> be, and the same hereby is, rendered herein favor of the Travelers Insurance Company, the plaintiff in this action, and against St. Jude Medical Office Buildings Limited Partnership and Krown Drugs, Inc., each to be bound solidarily in the principal amount of $1,699,526.00 together with accrued interest on this amount through August 15, 1991 in the amount of $2,688,603.00, which interest continues to accrue at the rate of $2,404 per diem from and including August 16, 1991, until paid, except that St. Jude Medical Office Buildings Limited Partnership shall be solidarily liable with Krown Drugs, Inc. for interest accruing on the principal amount only to the extent of the applicable judicial rate, as provided in La.R.S. 13: 4203, for all interest prior to and including the date of this judgment, and 28 U.S.C. 1961(B), for all interest arising after the date of this judgment until paid.

With the exception of the three amendments set forth above, the Court finds that the remainder of the errors alleged by defendants are without merit.

Similar to the standard for a Rule 59(a) new trial, Rule 59(e) relief, alteration or amendment of a judgment, is

available only when (1) an intervening change in the controlling law has occurred, (ii) evidence not previously available has become available, or (iii) it is necessary to correct a clear error of law or prevent manifest injustice. Weyerhaeuser Corp. v. Koppers Co., 771 F.Supp. 1406, 1419 (D.Md. 1991). Again, a Rule 59 motion cannot serve the purpose of giving a party a chance to present evidence it chose not to at trial or to have another opportunity to "sway the judge." Durkin v. Taylor, 444 F.Supp. 879, 889 (E.D.Va. 1977).

3. Applicable Interest on Principal Amounts Awarded to Travelers

Defendants assert numerous errors in the judgment in the application of both pre-judgment and post-judgment interest on the awards to Travelers. The Court has applied the interest rate called for in the lease agreements which form the basis

of Travelers' recovery of past due rents owed by LEI and Krown. Travelers presented testimony of an expert certified public accountant, Ralph Dazet, as proof of the total rents and interest due under the leases. Defendants chose not to present evidence as to the amounts of interest due on delinquent rental, or to even cross-examine Dazet on his calculations, electing to assert that no rental or interest was owed.

As a result, the jury accepted the amount of rents due and interest payable on those delinquent rents as established by Dazet's testimony. These calculations result in the imposition of legal interest on interest that already accrued by operation of the contractual provisions. Defendants contend that compounding of interest is not allowed either under the contracts or under Louisiana law. The contracts were presented as evidence at

trial and were available to them in the event they had any question with regard to the accrual of interest during the existence of the lease. In Questions 2 and 6, the jury was specifically asked to determine the "total amount of unpaid rent and interest owed" by LEI and Krown under their respective leases between the date of commencement and May 31, 1990. While it is the duty of the Court to determine legal interest applicable to the judgment, the jury in this case plainly found that Travelers was entitled to interest compounded annually while defendants failed to pay rent.

In Louisiana commercial transactions, which these transactions undoubtedly are, the general prohibition against recovery of interest on accrued interest is not applied. La.R.S.9: 3509(2).

The jury clearly found that Travelers is entitled to interest year-to-year on

unpaid rents. This Court is compelled to grant Travelers legal interest on all amounts awarded by the jury.

Defendants also contend that both the pre-judgment and post-judgment rates applied in the judgment are erroneous. The rates applied by the Court in calculating legal interest are the contract rates provided in the leases.

As relates to pre-judgment interest, defendants argue that the contracts do not provide for compound interest and, as a result, the pre-judgment interest calculations are excessive. As discussed above, compound interest is allowed in the context of commercial transactions. The jury awarded interest on an annual basis and legal interest will be applied by this Court to the amounts awarded by the jury.

Post-judgment interest will, likewise, continue to accrue at the contract rates. Defendants argue that 28

U.S.C.1961 governs with respect to the accrual of post-judgment legal interest, and not Louisiana state law. The Court agrees, but notes that 28 U.S.C. 1961 does not prevent application of the interest rate agreed upon by the parties to the contract just the same as it applies to pre-judgment interest calculations. See, In Re Lift & Equipment Service Inc., 816 F.2d 1013, 1018 (5th Cir. 1987). Both Bartholomew v. CNG Producing Co., 832 F.2d 326 (5th Cir. 1987) and Chapman & Cole v. Itel Container International B.V., 865 F.2d 676 (5th Cir. 1989), cited by defendants, hold that, as between state legal interest provisions and the federal legal rate set forth in 28 U.S.C. 1961, §1961 is to be applied, even in diversity cases. This Court does not interpret these cases, however, as precluding the application of a contractually agreed upon rate of interest between the parties to the contract.

The Court, therefore, does not find error in the calculation of pre-judgment or post-judgment interest in paragraphs 5 and 6.

Paragraphs 1 and 2 of the judgment, however, present a different situation. Therein, MOB is cast in judgment solidarily with LEI (paragraph 1) and Krown Drugs (paragraph 2) for amounts corresponding to the jury's findings in Questions 2 and 6 as the amount owed by LEI and Krown for unpaid rent and interest owed from the commencement date of their respective leases through May 31, 1990. Mob is cast in solidary liability with LEI and Krown as a result of the jury's finding that MOB negligently misrepresented to Travelers that it had collected all rents and costs coming due under the leases with LEI and Krown. Paragraphs 1 and 2 apply interest to all parties in accordance with the rate provided int he LEI and Krown Leases.

MOB also argues that it had no duty to correctly inform Travelers of Krown's failure to pay rent and that, even if it did, Travelers was not damaged by MOB's representation to the contrary. This argument neither presents any change in the law since the time of the trial nor does it assert any new evidence that was heretofore unavailable to MOB. MOB had every opportunity at trial to present its evidence to the jury on the issue of negligent misrepresentation. The jury was fully instructed on the legal elements required to support a claim of negligent misrepresentation. This Court will not substitute its judgment for that of the jury in this regard.

MOB was cast in solidary liability with LEI and Krown, respectively, because it was in the context of those parties' failure to pay rent and interest that the jury decided MOB negligently misrepresent-

ed that, as Travelers predecessor, MOB had properly exercised its contractual rights. Under Louisiana law defendants can be solidarily liable though their liability derives from different sources. La.Civ.C.Art. 1797. Even though the sources of liability differ, the Court has found that the damages owed by MOB are identical as those owed by LEI and Krown, in paragraphs 1 and 2, respectively.

Louisiana Civil Code Article 2324(B) was amended in 1987 to provide that "liability for damages caused by two or more persons shall be solidary only to the extent necessary for the person suffering injury, death, or loss to recover fifty percent of his recoverable damages." In other words, once one of two parties responsible for the same damages to a plaintiff, in an unspecified degree, has paid fifty percent of recoverable damages, the

plaintiff must then look to the other obligor for the remainder of his recovery.

This Civil Code article sets forth one of the effects of solidary obligations in Louisiana. If it applies to these parties, it will do so at the time Travelers executes whatever final judgment results from these proceedings. It does not change the result obtained herein. The judgment correctly states that MOB, being liable for the same damages as LEI and Krown, is solidarily liable with them. Therefore, the Court finds no error in paragraphs 1 and 2 of the judgment so as to warrant any amendment.

MOB also argues that Travelers cannot recover against it, personally, because of the in rem limitation contained in the promissory note to Travelers. The provision referred to by MOB, however, is merely a waiver by Travelers of its right to seek a deficiency judgment against MOB

"for any deficiency remaining after foreclosure or other judicial sale of the property." This covenant by Travelers, however, did not give MOB the right to forsake all other responsibilities and duties it owed to Travelers so as to not cause damage to Travelers. An independent, accessory obligation of any contract is that the parties not be allowed to take advantage of one another. Sanborn v. Oceanic Contractors, Inc., 448 So.2d 91 (La. 1984).

The jury found MOB to be liable to Travelers in several respects: negligent misrepresentation, waste of collateral securing the loan and breaching its contractual obligation to Travelers under its mortgage and collateral assignment of leases. None of these liabilities are covered by Travelers covenant not to sue for a foreclosure deficiency.

Defendants also contend that Travelers is prevented from enforcing its chattel mortgage against the movables listed in paragraph 15 of the judgment for two reasons: (1) the listed movables were removed from the premises for more than thirty days, terminating any security interest in the movables under La.R.S. 9:5370; and (2) Travelers' December 13, 1991 "release in full" of the Real and Chattel Mortgage, by which Travelers directed the Clerk of Court for the Parish of Jefferson to cancel the mortgage from his records. MOB asserts that its surreptitious removal of valuable movables from the seventh floor of the premises now entitles it to defeat the chattel mortgage held by Travelers. MOB has heretofore denied having any ownership interest in the movables at issue. MOB contends that Travelers knew of the removal of the items and even asked members of the partnership

about their removal. Travelers was advised, however, that MOB did not own the items being removed. In the face of these assertions, Travelers did all that it could to assert its rights in the property - obtain a judicial determination of ownership. Having done so, MOB responds by attempting to profit from its previous evasive maneuvers.

To preclude Travelers from asserting its security rights in the paragraph 15 movables because of its detrimental reliance on the actions of MOB would be "unjust, unfair, and unacceptable." U.S. Use of Bernard Lumber Co. v. Lanier-Gervais Corp., 896 F.2d 162, 168 (5th Cir. 1990).

As a result of MOB's voluntary conduct with regard to the removal of the paragraph 15 movables, MOB is thus equitably estopped from defeating the chattel mortgage of Travelers.

Travelers also correctly points out that the erasure of recordation of the mortgage in no way impaired its security rights in the movable property. Travelers' rights in those movables were set forth in the August 8, 1991 jury verdict. The erasure of the mortgage is of absolutely no effect as between Travelers and LEI and Krown.

Finally, defendants argue that the jury failed to compensate against the rents owed by LEI for funds loaned by LEI to MOB. Again, this evidence was presented to the jury and the jury was instructed on compensation. Inasmuch as the jury did not award all of the rent asked for by Travelers, according to Dazet's testimony, the jury obviously allowed for some compensation.

II. TRAVELERS' MOTION TO AMEND OR ALTER JUDGMENT

Travelers seeks to alter or amend the judgment in several respects, namely: to cast defendants in liability for Travelers attorney's fees and related expenses, to make express that the defendants are liable for costs, to clarify that the promissory note granted by MOB remains a valid and enforceable in rem obligation of the partnership, to make express that the counterclaims of the defendants have been dismissed with prejudice, and to direct defendants to return to MOB or another location designated by Travelers the various furniture, fixtures and equipment which defendants wrongfully removed from MOB.

1. Attorney's fees

Travelers obtained judgment against LEI under Section 22(g) of the lease for past due rents and future unpaid rents. Future rents have been limited to the

period up to October 18, 1991, when the leased property was sold at judicial sale of that date.

Section 22(g) provides in pertinent part:

> In said events or any of them, Lessor may, at Lessor's option, without any notice or putting in default, (1) proceed for past due installments of rent only, reserving its right to proceed later for the remaining installments; or (2) declare all of the unpaid installments of rent at once due and exigible, and the whole thereof shall become and be immediately due and payable anything herein to the contrary notwithstanding, and to proceed to enforce its legal remedies hereunder; or (3) cancel this Lease, and immediately expel Lessee, without, however, waiving Lessor's right to collect all installments of rent and all other payments due or owing for the period up to the time Lessor regains occupancy, including costs, attorney fees, and for a judgment of condemnation without the necessity of a formal suit or judgment of condemnation and the date of taking under this paragraph shall then be deemed the date agreed to under the terms of said agreement or stipulation.

Travelers chose as its remedy option (2), acceleration of the rents, of the three remedies set forth in Section 22(g). Having made this selection, Travelers cannot now invoke the remedies available under options (1) and (3). The Court interprets Section 22(g) as allowing attorney's fees only where the lessor obtains a cancellation of the lease and expels the lessee. Attorney fees are only mentioned in connection with this remedy. The three remedies described in Section 22(g) are separated by the disjunctive conjunction "or."

The Court finds that Travelers is not entitled to an award of attorney's fees against LEI and MOB in connection with the judgment awarding Travelers past due and future rents, through October 18, 1991.

The only entity that could arguably have agreed to pay attorney's fees under the circumstances of this lawsuit was

Krown, which agreed, as "Tenant," to reimburse its "Landlord's" attorney's fees incurred to enforce the Landlord's rights in the event of continued default by Tenant. See Section 16.7 of the Krown lease. MOB, although solidarily liable along with Krown for the rents, is not liable for attorney's fees as a result of its negligent misrepresentation. Attorney's fees are not allowed in Louisiana except where authorized by statute or contract. Quealy v. Paine, Webber, Jackson & Curtis, Inc., 475 So.2d 756, 763 (La. 1985). Attorney's fees are not, generally, allowed as a result of a tortious negligent misrepresentation. Leflore v. Anderson, 537 So.2d 215, 218 (La. App. 4th Cir. 1988).

With respect to Section 16.7 of the Krown lease, the Court finds that, under the circumstances presented here, Section 16.7 does not expressly require Krown to pay attorney's fees to Travelers. The

judgment will not be amended to award any attorney's fees to Travelers.

2. Costs

Rule 54(d) provides that "costs shall be allowed as of course to the prevailing party unless the court otherwise directs." Travelers is correct in its position that the judgment should provide for costs. The Court does not agree, however, that Travelers is entitled to reimbursement of its costs from the defendants. Travelers failed on a number of claims against each of the defendants. The Court is of the opinion that each party should bear its own costs. The Judgment will be amended, therefore, as follows:

> 16. IT IS HEREBY ORDERED, ADJUDGED AND DECREED that each party is to bear its own costs.

3. Dismissal of claims

The judgment correctly reflects the disposition of all claims made party of the trial of this lawsuit. No amendments

will be made with regard to any claims dismissed.

4. Delivery of Movables Removed from the MOB

Travelers requested that the judgment be amended to order defendants to deliver to Travelers all of the movables listed in paragraph 15 of the judgment. It is the Court's understanding that a writ of sequestration has issued and a keeper has been appointed, and that all items have been inventoried and turned over to the keeper.[1] The judgment, therefore, will not be amended as to this request.

Accordingly,

IT IS ORDERED that:

1. Defendants' Motion for New Trial and Alternative Order for Alteration or

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[1]The Court is aware that Travelers has filed a Motion for Preliminary Injunction and for Contempt alleging that defendants concealed some of the movables listed in paragraph 15 and did not turn these over to the keeper. That motion is not addressed by this opinion but will be ruled on separately at a later time.

Amendment of the Judgment is GRANTED in part and DENIED in part;

2. Travelers' Motion to Amend or Alter Judgment is GRANTED in part and DENIED in part;

3. The Judgment of August 17, 1992 shall be amended as follows:

> 2. IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Judgment be, and the same hereby is, rendered herein in favor of the Travelers Insurance Company, the plaintiff in this action, and against St. Jude Medical Office Buildings Limited Partnership and Krown Drugs, Inc., each to be bound solidarily in the principal amount of $1,699,526.00 together with accrued interest on this amount through August 15, 1991 in the amount of $2,688,603.00, which interest continues to accrue at the rate of $2,404.00 per diem from and including August 16, 1991, until paid, except that St. Jude Medical Office Buildings Limited Partnership shall be solidarily liable with Krown Drugs, Inc. for interest accruing on the principal amount only to the extent of the applicable judicial rate, as provided in La. R. S. 13:4203, for all interest prior to and including the date of this judgment, and as provided in 28 U.S.C. 1961(B), for

all interest arising after the date of this judgment and until paid.

5. IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Judgment be, and the same hereby is, rendered herein in favor of the Travelers Insurance Company, the plaintiff in this action, and against Liljeberg Enterprises, Inc. in the principal amount of $484,004.50, together with interest accruing from June 1, 1990 until paid at the rate of eleven percent, compounded monthly.

6. IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Judgment be, and the same hereby is, rendered herein in favor of the Travelers Insurance Company, the plaintiff in this action, and against Krown Drugs, Inc. in the principal amount of $597,261.57, together with interest accruing from June 1, 1990 until paid at the rate of twenty percent, compounded monthly.

16. IT IS HEREBY ORDERED, ADJUDGED AND DECREED that each party is to bear its own costs.

New Orleans, Louisiana this 24 day of NOV -, 1992.

/s/ Henry A. Mentz, Jr.
UNITED STATES DISTRICT JUDGE

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
DECEMBER 03 1992
LORETTA G. WHYTE
CLERK

DEFENDANT'S
EXHIBIT
B

DATE OF ENTRY DEC 03 1992

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

THE TRAVELERS INSURANCE COMPANY	CIVIL ACTION NO. 90-1983 c/w NO. 90-2601
VERSUS	
	SECTION "I" (6)
ST. JUDE HOSPITAL OF KENNER, LOUISIANA, INC., ET AL.	

AMENDED JUDGMENT

Considering the answers to the jury interrogatories propounded by the Court, and consistent with this Court's prior minute entries dated February 21, 1991 and April 11, 1991, the Partial Final Judgment dated September 24, 1990, the Court's Order of July 30, 1991 granting the Motion

for Directed Verdict of plaintiff, Travelers Insurance Company, the Court's Order and Reasons of August 17, 1992, the Court's Order of August 13, 1992, and the Court's Order and Reasons of November 25, 1992,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Judgment be, and the same hereby is, rendered herein favor of the Travelers Insurance Company, the plaintiff in this action, and against the defendants, St. Jude Medical Office Buildings Limited Partnership, Liljeberg Enterprises, Inc., Krown Drugs, Inc., John A. Liljeberg and Robert Liljeberg, as follows:

1. IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Judgment be, and the same hereby is, rendered herein favor of the Travelers Insurance Company, the plaintiff in this action, and against St. Jude Medical Office Buildings Limited Partnership

and Liljeberg Enterprises, Inc., each to be found solidarily in the principal amount of $773,058.00, together with accrued interest on this Amount through August 15, 1991 in the amount of $497,164.00, which interest continues to accrue at the rate of $383 per diem from and including August 16, 1991, until paid.

2. IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Judgment be, and the same hereby is, rendered herein favor of the Travelers Insurance Company, the plaintiff in this action, and against St. Jude Medical Office Buildings Limited Partnership and Krown Drugs, Inc., each to be bound solidarily in the principal amount of $1,699,526.00 together with accrued interest on this Amount through August 15, 1991 in the amount of $2,688,603.00, which interest continues to accrue at the rate of $2,404 per diem from and including August 16, 1991, until paid, except that

St. Jude Medical Office Buildings Limited Partnership shall be solidarily liable with Krown Drugs, Inc. for interest accruing on the principal amount only to the extent of the applicable judicial rate, as provided in La. R. S. 13:4203, for all interest prior to and including the date of this judgment, and as provided in 28 U.S.C. 1961(B), for all interest arising after the date of this judgment and until paid.

3. IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Judgment be, and the same hereby is, rendered herein favor of the Travelers Insurance Company, the plaintiff in this action, and against St. Jude Medical Office Buildings Limited Partnership, Liljeberg Enterprises, Inc., John A. Liljeberg, and Robert Liljeberg, each to be bound solidarily in the principal amount of $175,000, together with judicial interest as allowed by law, until paid.

4. IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Judgment be, and the same hereby is, rendered herein favor of the Travelers Insurance Company, the plaintiff in this action, and against St. Jude Medical Office Buildings Limited Partnership in the principal amount of $214,942.00, together with judicial interest as allowed by law, until paid.

5. IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Judgment be, and the same hereby is, rendered herein in favor of the Travelers Insurance Company, the plaintiff in this action, and against Liljeberg Enterprises, Inc. in the principal amount of $484.004.50, together with interest accruing from June 1, 1990 until paid at the rate of eleven percent, compounded monthly.

6. IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Judgment be, and the same hereby is, rendered herein in favor of the

Travelers Insurance Company, the plaintiff in this action, and against Krown Drugs, Inc. in the principal amount of $597,261.57, together with interest accruing from June 1, 1990 until paid at the rate of twenty percent, compounded monthly.

7. IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Judgment be, and the same hereby is, rendered herein favor of the defendant, St. Jude Hospital of Kenner, La., Inc., and against the plaintiff, the Travelers Insurance Company, dismissing with prejudice plaintiff's claim for declaratory relief seeking recognition of the existence of a servitude in favor of Parcel "B-1", Loyola Tract (Formerly Monroe Tract) University City Subdivision, City of Kenner, Parish of Jefferson, State of Louisiana, burdening or encumbering the underground sewerage and water drainage system located on Parcel "A", Loyola Tract

(formerly Monroe Tract), University City Subdivision, City of Kenner, Parish of Jefferson, State of Louisiana.

8. IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Judgment be, and the same hereby is, rendered herein favor of the defendants, St. Jude Medical Office Building Limited Partnership, The Travelers Insurance Company, and Travelers Realty Investment Company, and against the plaintiff, St. Jude Hospital of Kenner, La., Inc., dismissing with prejudice all claims in case number 90-2601.

9. IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Judgment be, and the same hereby is, rendered herein favor of the defendants, St. Jude Hospital of Kenner, La., Inc., St. Jude Medical Office Building Limited Partnership, Liljeberg Enterprise, Inc., John A. Liljeberg, Robert Liljeberg, and Krown Drugs, Inc., and against the plaintiff, The Travelers In-

surance Company, dismissing with prejudice all of plaintiff's fraudulent misrepresentation claims and demands.

10. IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Judgment be, and the same hereby is, rendered herein favor of the defendant, St. Jude Medical Office Building Limited Partnership, and against the plaintiff, The Travelers Insurance Company, dismissing with prejudice plaintiff's claim for recovery of the outstanding balances due under the October 10, 1985 promissory note executed by St. Jude Medical Office Building Limited Partnership in favor of the Travelers Insurance Company in the principal amount of $25,000,000.00.

11. IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Judgment be, and the same hereby is, rendered herein favor of the defendant, Liljeberg Enterprises, Inc., and against the plaintiff, The Travelers

Insurance Company, dismissing with prejudice all claims and demands of breach of contractual obligations under the mortgage and collateral assignment of leases.

12. IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Judgment be, and the same hereby is, rendered herein favor of the defendant, Liljeberg Enterprises, Inc., and against the plaintiff, The Travelers Insurance Company, dismissing with prejudice all claims and demands for negligent misrepresentation.

13. IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Judgment be, and the same hereby is, rendered herein favor of the defendant, Krown Drugs, Inc., and against the plaintiff, The Travelers Insurance Company, dismissing with prejudice all claims and demands for negligent misrepresentation.

14. IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Judgment be, and the same

hereby is, rendered herein favor of the Travelers Insurance Company, the plaintiff in this action, recognizing that the certain Collateral Assignment of Leases dated October 10, 1985, executed by St. Jude Medical Office Buildings Limited Partnership in favor of the Travelers Insurance Company, and recorded in COB 1344, folio 179 in the Conveyance Records for the Parish of Jefferson, State of Louisiana is valid and enforceable in accordance with its terms.

15. IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Judgment be, and the same hereby is, rendered herein favor of the Travelers Insurance Company, the plaintiff in this action, recognizing that the certain Real and Chattel Mortgage dated October 10, 1985, executed by St. Jude Medical Office Buildings Limited Partnership in favor of the Travelers Insurance Company, and recorded in MOB 1314, folio 278 in the

Mortgage Records for the Parish of Jefferson, State of Louisiana is valid and enforceable in accordance with its terms and encumbers, among other movable property, (i) the improvements and (ii) the furniture, fixtures and equipment owned by St. Jude Medical Office Building Limited Partnership, which are located at the St. Jude Medical Office Building and also the following which were removed from the St. Jude Medical Office Building:

5 Drapes with sheers
5 Mini blinds
5 Curtain rods, travis and sheers
2 Napoleon framed pictures (Graphites)
2 Burgundy love seats (Leather)
4 Chairs (Leather)
2 Glass entrance doors (etched LEI)
1 Large door frame unit
1 Wood panel door (Closet door jam unit)
1 Wood panel door with door jam unit (Entrance to executive area)
1 Secretary desk with return
1 Secretary chair (Fabric)
1 Set of molding strip units
1 Set of base board units
2 Omega phones
1 Calculator
1 IBM Wheelwriter typewriter
2 Secretary pedestal desks with returns (glass tops)

1 Leather sofa
3 Leather chairs
2 Steno chairs
6 Silk flower arrangements
4 Stackable desk trays
1 Answer machine
6 Curtain panels
5 Sheer panels
5 Venetian blinds
2 Trash cans
1 2-drawer lateral file
1 Carpet protector
Assorted planters and plants
1 Executive desk
1 Credenza
2 Sheers
1 Set of base board units
2 Fabric love seats (black)
1 Lamp table
1 Set of molding strip units
1 Foyer throw rug
1 Framed picture (Waterloo) Napoleon
2 Secretary desks with returns
1 Secretary chair
2 Wood and fabric arm chair
7 Framed pictures
1 Long hall carpet runner (orange and beige)
1 Executive desk
2 Sets of drapes
3 Mini blinds-rods
1 Set of molding strip units
1 Carpet (burgundy with beige edge)
2 Sheers
1 Louisiana pelican picture(framed)
1 Fair Grounds picture (framed)
2 Panel doors with door jam unit
1 Executive desk chair (blue leather)
3 Sets of curtains
3 Sheers
3 mini blinds
1 set of base board units
3 frame panel doors with door jam units

1 42" Zenith television
2 plywood sliding doors and top in closet
1 refrigerator - ERS 250/255 #50704617
1 set of molding strip units
1 45" television
2 leather sofa
5 leather chair
1 ottoman
1 credenza with glass buffet
1 writing desk (claw foot)
2 wood cabinet
1 VCR
1 jacuzzi unit with slide away marble unit and movable steps
2 set of sheers - curtains
2 mini blinds
2 throw rugs
3 striped bath benches
2 panel doors with door jam units
2 brass shower heads with controls
1 glass and wood trim mirror
1 brass faucet unit
2 wood panel closet doors with shelving
1 19" Panasonic color television #CTJ1941R
4 sets of panel door units (slide out)
1 commode (beige) (Kohler)
1 executive desk
1 brass basket (firewood holder)
1 brass and glass fireplace front
1 credenza
1 executive chair (leather)
1 set of brass fireplace tools with stand
12 wood panel units (6 upper, 6 lower)
8 wood panel units (window treatment)
2 sets of chair molding units (lengths)
2 sets of wood base board units

(lengths) and molding strip units
2 panel doors with door jam units
1 round brass and glass table
1 Kenmore compact refrigerator #41107485
3 wood cabinet with drawers
1 wood base with blue granite top
2 stereo speakers (Boze)
1 stereo unit MOO #GXR66
1 turntable
1 compact disc unit
1 glass and metal cabinet
1 wood shelving closet unit
1 round table
4 upholstered chairs (leather)
1 blue sofa (leather)
1 blue lounge chair (leather)
2 wood chairs
2 glass top end table
2 brass lamp
1 miscellaneous china and crystal
24 burgundy arm chairs
2 oversize burgundy chairs (leather)
1 12' wood credenza
1 round wood pedestal
4 wood panel doors with door jam units
2 wood entrance doors with door jam unit trim
4'x8' - 2 1/4 inch thick
1 wood bar unit with brass rail
1 wood bar unit rear with side unit and overhead removable panels attached
14 wood panel (solid units)
9 wood panel (window units)
9 wood sills
12 curtains; sheers; rods
12 mini blinds
2 wooden closet shelves
1 brass bar sink
1 brown commode (Kohler)
1 beige carpet
7 wood panels (upper and lower units)

1 chair rail trim units
1 set of upper & lower trim units
4 brass floor door stops
1 12' wooden credenza
2 wood and fabric arm chairs
1 wooden framed print of "New Orleans" picture
1 burgundy carpet
1 brown wood trim mirror
2 wood panel doors with door jam units
1 Canon fax machine
1 Omega phone
3 Wang workstations
1 Daisy printer
1 Band printer
1 disk drive
1 CPU
1 minute man
3 chairs
1 2-drawer lateral file
7 steelcase 4-drawer files
1 phone used for fax
2 battery packs
1 drop in/slide out garbage disposal unit
1 refrigerator
1 Thermadore dishwasher
1 slide in self-contained cook top and oven unit
1 microwave oven combo unit with wood casing
1 stainless steel hood
1 double sink
1 19" Mitsubishi television
2 counter tops
16 wood kitchen cabinets
2 wood panel door & door jam unit
2 wood cabinet doors
1 throw carpet
1 brass toilet paper holder
1 refrigerator (Hot Point)
1 stereo sound system & speaker
1 sofa (fabric)

2 chair (fabric) (Kimball)
8 chairs (brown fabric; roller)
6 chairs (fabric; wood base)
1 base board unit
1 file cabinet (2 drawer)
3 bookcase unit
1 double sink
1 refrigerator
3 set of books; So. 2d Rep. V. 1-550
1 set of books; La.R.S.
1 set of books; La.C.C.
1 set of books; La. C.P.
1 set of books; La.C.C.P.
1 set of books; La.Const.
1 set of books; Index to LSA
1 set of books; Index to La. Digest (1st Ed.)
2 mini blinds
5 wood cabinet unit
1 wood cabinet top unit
1 granite counter top
2 wood cabinet lower unit
3 wood panel door with door jam unit
2 mini blinds
2 set of drapes and sheers
1 set of upper and lower trim
1 corner cabinet wood
12 granite panel
8 panel trim unit
8 wood panel unit upper and lower
4 wood panel column unit
4 wood panel ceiling trim unit
860' metal stud (20 gauge)
74 sheetrock
10 flag pole
4 wood credenza
1 wood file cabinet
3 lounge chair
19 steelcase chair
16 Kimball chair
3 reception chair
1 office chair
52 vinyl wallpaper (roll)
5 carpet (roll)

1 drill press
1 tool chest and assorted tools
1 vacuum cleaner
17 phones
1 Pitney Bowes postage machine
2 check protectors
3 4-drawer metal files
3 2-drawer metal files
1 fire-proof file
3 steelcase 4-drawer lateral files
2 8' metal shelf units
1 etagere
2 postage scales
1 paper cutter
6 stackable chairs
1 upholstered chair
1 dressing table
1 calculator
1 desk lamp
5 framed prints
1 Canon copier
4 Omega phones
4 calculators
6 steno chairs
1 terminal display table
1 typewriter table
2 credenza
2 exec. pedestal desk with returns (glass tops)
4 steelcase 4-drawer lateral files
2 secretary pedestal desk with return (glass tops)
4 framed floral prints
1 Wang workstation
1 bottled water dispenser
1 small refridgerator [sic]
1 coffee pot
1 3-shelf cart
2 silk arrangements
2 oil paintings from Kurt Schoen
3 data binder nanging files
1 PC -printer - CPU - surge protector
6 carpet protectors
2 venetian blinds

7 trash cans
20 stackable desk trays
Assorted live plants and arrangements
1 folding table
1 Xerox copier
1 time clock
1 Omega phone
1 calculator
1 2-drawer lateral file
1 credenza
1 conference top desk
1 computer table
1 PC - printer - CPU - surge protector
4 framed prints
1 leather desk chair
1 leather sofa and chair
1 storage cabinet
2 lamps
2 chairs
1 coat rack
2 curtains with valance
2 venetian blinds
1 carpet protector

16. IT IS HEREBY ORDERED, ADJUDGED AND DECREED that each party is to bear its own costs.

New Orleans, Louisiana, this 2d day of ~~November~~ *December*, 1992.

/s/ Henry A. Mentz, Jr.
UNITED STATES DISTRICT JUDGE

The TRAVELERS INSURANCE COMPANY, Plaintiff-Appellee Cross-Appellant,

v.

LILJEBERG ENTERPRISES, INC., Defendant-Appellant Cross-Appellee.

No. 92-9581.

United States Court of Appeals, Fifth Circuit.

Nov. 26, 1993.

Kenneth Charles Fonte, Golden & Fonte, Metairie, LA, William F. Wessel, Wessel, Bartels & Ciaccio, New Orleans, for defendant-appellant.

Brent Bennett Barriere, S. Ault Hootsell, III, New Orleans, for plaintiff-appellee.

Appeals from the United States District Court for the Eastern District of Louisiana.

Before SNEED*, REYNALDO G. GARZA, and JOLLY, Circuit Judges.

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*Senior Circuit Judge of the Ninth Circuit, sitting by designation.

SNEED, Senior Circuit Judge:

This is a case involving a large landlord-lender and a major corporate tenant. Defendant Liljeberg Enterprises, Inc. (LEI), the tenant, appeals the district court order granting Plaintiff Travelers Insurance Company (Travelers), the landlord-lender, summary judgment in Travelers's action to enforce two leases, 799 F.Supp. 641 (E.D.La. 1992).

Travelers cross appeals on the grounds that (1) the district court should have awarded accelerated rent with interest according to Louisiana law from the date of LEI's default rather than legal interest from the date of judgment and (2) the district court should have awarded attorney fees.

We affirm the district court's grant of summary judgment to Travelers but remand for entry of judgment to award Travelers pre-judgment interest.

I.

FACTS AND PRIOR PROCEEDINGS

The facts pertinent to the leases at issue are not in dispute. LEI initially leased space in the St. Jude Medical Office Building (the building) on May 1, 1985, from the St. Jude Medical Office Building Limited Partnership (Partnership). Under this first lease, LEI rented 11,893 square feet of the building for a ten-year term from August 1, 1985, to July 31, 1995, at a monthly rate of $14,866.25. The Partnership was authorized to grant a mortgage on the building to an "Institutional Mortgagee," defined to include insurance companies like Travelers.

On October 10, 1985, Travelers loaned the Partnership $25 million, and the Partnership executed and delivered to Travelers an interest-bearing promissory note in that amount plus interest. The Partnership granted Travelers a mortgage on the

building and assigned all rents to be paid on leased spaces in the building to Travelers.

On May 1, 1987, LEI entered into a second lease with the Partnership for an additional 1,800 square feet in the building. This lease was for a five-year term and had a monthly rental of $2,250; it also was subject to the lease assignment and was identical in form to the first lease.

In March 1990, the Partnership defaulted on its payments to Travelers. Travelers filed suit against the Partnership in June 1990.[1] At public auction on October 18, 1991, the building was sold to Travelers, the only bidder. Acting pur-

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[1]In this foreclosure action against the Partnership (Travelers Ins. Co. v. St. Jude Hosp., No. 90-1983), the district court entered partial summary judgment for Travelers, recognized its mortgage on the building, and directed that the property be sold.

suant to section 20(g)[2] of the first and second leases, Travelers delivered to LEI two proposed leases on November 15, 1991. LEI refused to sign the leases or pay any monthly rentals.

On December 11, 1991, Travelers sent LEI a notice of default. LEI neither responded nor paid the outstanding rental. Travelers then elected to accelerate all rent payments pursuant to section 22 of the leases. On January 6, 1992, Travelers

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[2]Section 20(g) of the leases provides:

> [I]n the event of the termination of this Lease or of any succeeding lease made pursuant to the provisions of this clause prior to the expiration date, Lessee will enter into a new lease of the Leased Premises with the Institutional Mortgagee for the remainder of the term of this Lease, effective as of the date of such termination, at the rent and additional rent and upon the covenants, agreements, terms, provisions and limitations herein contained provided such Institutional Mortgagee makes written request upon the Lessee for such new lease within thirty (30) days from the date of such termination.

filed a complaint against LEI in district court seeking a declaratory judgment that the proposed leases were valid and enforceable and seeking damages in the amount of all accelerated rent due under the leases with contractual interest, costs, and attorney fees. LEI answered the complaint and denied liability.

Travelers moved for summary judgment on June 16, 1992. LEI submitted its opposition response on July 7, 1992, with a supporting affidavit from its president, who claimed that Travelers failed to deliver possession of the premises. Travelers's motion was taken under consideration by the district court on July 15, 1992. On July 17, 1992, Travelers submitted its reply memorandum;[3] exhibits were attached,

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[3]On July 17, 1992, Travelers moved to submit a Memorandum in Reply to LEI's Opposition to Travelers's Summary Judgment Motion on the ground that LEI's Opposition raised issues not addressed in Travelers's original memorandum. The court granted this motion on July 20, 1992.

including an affidavit[4] of Yvette Maher, the building's property manager. Maher attested that LEI never had been denied access to its building space and that the space neither had been leased to nor otherwise used by anyone except LEI.

Deciding Travelers's motion on the briefs and exhibits, the district court granted Travelers summary judgment on August 13, 1992. On August 18, 1992, the court awarded Travelers damages of $746,086.95 with legal interest from the date of judgment and all costs. Both parties appeal, with LEI seeking to overturn the judgment and Travelers seeking to increase it.

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[4]The deadline for filing of pleadings was July 17, 1992. Because Travelers had not received Maher's executed affidavit by that date, it submitted an unexecuted affidavit. On July 20, 1992, Travelers moved to substitute the unexecuted affidavit with the executed version. On July 22, 1992, the court granted the motion. We discuss the propriety of this decision below.

II.

JURISDICTION AND STANDARDS OF REVIEW

The district court had diversity jurisdiction pursuant to 28 U.S.C. § 1332. This court has jurisdiction pursuant to 28 U.S.C. § 1291.

Our review of the district court's grant of summary judgment is de novo. Fireman's Fund Ins. Co. v. Murchison, 937 F.2d 204, 207 (5th Cir.1991). We must ask whether no questions of material fact exist that would bar the moving party from being entitled to judgment as a matter of law. Schuster v. Martin, 861 F.2d 1369, 1371 (5th Cir.1988). Our standard of review for contract interpretation is de novo. See Matador Drilling Co. v. Post, 662 F.2d 1190, 1197 (5th Cir.1981).

III.

DISCUSSION

LEI raises three issues on appeal. First, LEI contends that summary judgment was improper because the pleadings and affidavits raised a genuine issue of material fact concerning whether Travelers had delivered possession of the leased premises. Second, LEI claims that the district court improperly considered an affidavit submitted by Travelers. Third, LEI argues that the district court erred in interpreting and applying various lease provisions. We discuss each in turn.

A. Summary Judgment

First, we consider LEI's contention that summary judgment was improper because there was a genuine issue of material fact concerning whether Travelers denied LEI access to the leased premises. In opposing Travelers's motion, LEI submitted

president John A. Liljeberg, Jr.'s, affidavit, which included conclusory allegations that Travelers had not provided LEI with possession.[5] This affidavit did not indicate when or how LEI was denied possession of the premises. Responding to LEI's opposition, Travelers attached to its reply memorandum Maher's affidavit in which she attested that LEI never was denied access to its space in the building.

[1,2] This exchange does not necessitate a trial on the issue of possession. When seeking summary judgment, the moving party bears the burden of showing there are no genuine factual issues such that the movant is entitled to judgment as a

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[5]The statements in this affidavit concerning possession were:

> Travelers has not provided LEI with possession of the premises described by the First Proposed Lease.
> Travelers has not provided LEI with possession of the premises described by the Second Proposed Lease.

matter of law. The opponent must meet the movant's affidavits with opposing affidavits that set out specific facts showing an issue for trial. See Gossett v. Du-Ra-Kel Corp., 569 F.2d 869, 872 (5th Cir.1978) (citations omitted). Although the Fifth Circuit has not been liberal in affirming summary judgments, "conclusory allegations supported by a conclusory affidavit will not suffice to require a trial." Shaffer v. Williams, 794 F.2d 1030, 1033 (5th Cir.1986). This is true even if the movant cannot demonstrate contrary facts by specific affidavit recitation to rebut the conclusory affidavit. See id.; Fontenot v. Upjohn Co., 780 F.2d 1190, 1196 (5th Cir.1986); see also Broadway v. Montgomery, 530 F.2d 657, 660 (5th Cir.1976) (nonmovant's affidavit reciting unsupported, conclusory allegations insufficient to avoid summary judgment). Two

opposing conclusory affidavits do not preclude summary judgment.

[3] Under Louisiana law, "possession" is defined as the exercise of physical acts of use, detention, or enjoyment over a thing. La.Civ.Code Ann. art. 3425. Liljeberg's affidavit did not raise a genuine issue of possession. Having offered no evidence of specific acts taken by Travelers that resulted in LEI's loss of possession, Liljeberg's affidavit left open only the possibility that LEI had voluntarily surrendered possession to someone other than Travelers. This creates no genuine issue relevant to this case.

[4] Second, we consider LEI's argument that the district court erred in allowing Travelers to submit a reply memorandum with exhibits after having submitted its summary judgment motion. Specifically, LEI maintains that the court

erred in considering the Maher affidavit that was attached to the reply memorandum without affording LEI a hearing and an opportunity to object to or contradict the affidavit in a genuine issue-creating manner.

We find this procedural challenge unpersuasive. Rule 56(c) of the Federal Rules of Civil Procedure requires that the party opposing a summary judgment motion receive 10 days' notice that the matter will be taken under advisement on a certain day. See Fed.R.Civ.P. 56(c); Kibort v. Hampton, 538 F.2d 90, 91 (5th Cir.1976). It is undisputed that LEI received sufficient notice that the court would be considering Travelers's motion on a specific date and that LEI had the opportunity to respond with affidavits.

[5] Nor was the Maher affidavit so untimely that the district court erred in considering it. Travelers's reply memo-

randum was submitted on July 17, 1992, with Maher's unexecuted affidavit, which it substituted with an executed affidavit five days later with the court's permission. LEI had notice of the contents of the Maher affidavit on July 17, 1992, the date Travelers moved to submit its reply memorandum. Three weeks elapsed between the submission of the executed affidavit on July 22, 1992, and the court's grant of summary judgment on August 13, 1992. LEI had ample time to object to the Maher affidavit but never did. LEI filed no motions to supplement its opposition to Travelers's summary judgment motion.

[6,7] Third, we now consider LEI's argument that the court misinterpreted the lease terms. LEI argues that the district court should not have enforced the leases because, when Travelers delivered them to LEI, it already had foreclosed its mortgage and thus was no longer an "Institu-

tional Mortgagee" entitled to enforce section 20(g) of the original leases. Under Louisiana law, a contract is read for its plain meaning. See Ingram Corp. v. J. Ray McDermott & Co., 698 F.2d 1295, 1312 (5th Cir.1983). "When the words of a contract are clear and explicit and lead to no absurd consequences, no further interpretation may be made in search of the parties' intent." La.Civ.Code Ann. art. 2046. See, e.g., Ransom v. Camcraft, Inc., 580 So.2d 1073, 1076 (La.Ct.App. 1991). We agree with the court's interpretation of sections 20(f) and (g) and find that they provided for foreclosure by Travelers and enabled it to enforce the leases.[6] Despite foreclosure, Travelers

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[6]Sections 20(f) and (g) are joined by an "and" so that they are read together to allow the Institutional Mortgagee's rights to survive foreclosure. Section 20(f) provides:

> [A]ny Institutional Mortgagee or third person purchaser at a foreclosure sale may become the legal owner

remained an "Institutional Mortgagee."

Moreover, we find no merit in LEI's arguments that Travelers cannot invoke section 20(g) because (1) it does not contemplate a third party beneficiary, or (2) if a third party beneficiary contract was created, Travelers cannot receive the benefits because it failed to manifest its intention to receive them before the original leases were dissolved at the judicial sale. Essentially these arguments rest on those already rejected. The contracts, sensibly read, repudiate these conten-

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> or holder of this Lease by foreclosure of the Institutional Mortgage or as a result of the assignment of this Lease in lieu of foreclosure, whereupon such Institutional Mortgagee or third person purchaser shall immediately become and remain liable under this Lease, except that, as to accrued amounts payable by Lessor to Lessee under this Lease as of such date, the Lessee shall have no recourse against the Institutional Mortgagee; and . . . .

See supra note 2 for text of section 20(g).

tions. Further, we agree with the court's interpretation of section 22(g) as allowing Travelers to collect accelerated rentals as a remedy for LEI's default.

B. Award of Interest

Travelers raises two issues in its cross appeal. First, it contends that it should have received prejudgment and postjudgment interest at the contractual rate rather than only postjudgment interest at the federal legal rate. Second, Travelers argues that it was entitled to attorney fees under the lease terms.

Travelers directs our attention to section 2(c) of the leases, which provides that any rental payment not made within 10 days of the first day of the month in which it is due "shall bear a late charge equal to the highest legal interest rate allowable for each month in which payment is delinquent." Travelers reads this to

mean (1) that interest began to accrue on LEI's rental obligations 10 days after default, which occurred several months prior to the district court's entry of judgment, and (2) that the "highest legal interest rate" refers to any interest that does not violate Louisiana's prohibition on usury. Travelers urges us to employ the legal rate used by Louisiana courts, which is higher than the legal rate under federal law.[7]

1. Prejudgment Interest

[8,9] The district court awarded Travelers only postjudgment interest at the federal legal rate pursuant to 28

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[7]Louisiana's legal interest rate is set out in article 2924(B)(3)(a) of its Civil Code. As amended in 1989, it provides that the rate of judicial interest resulting from a lawsuit pending or filed on or after January 1, 1988, "shall be equal to the rate as published annually . . . in the Louisiana Register by the commissioner on financial institutions." La.Civ.Code Ann. art. 2924(B)(3)(a).

U.S.C. § 1961. This statute, however, has no bearing on whether Travelers is entitled to prejudgment interest. See, e.g., West v. Harris, 573 F.2d 873, 882 (5th Cir.1978), cert. denied, 440 U.S. 946, 99 S.Ct. 1424, 59 L.Ed.2d 635 (1979). It does not limit successful plaintiffs to interest from the date of judgment. See Louisiana & Ark. Ry. v. Export Drum Co., 359 F.2d 311, 317 (5th Cir.1966). Situations should be recognized in which a wronged party can be afforded full relief only if awarded interest from the date payment should have been received rather than from the date of judgment alone. See, e.g., West, 573 F.2d at 883; Export Drum Co., 359 F.2d at 317. Because the lease terms provided that interest would begin accruing 10 days after the lessee's payment became due, Travelers should have received prejudgment interest as well as postjudgment interest. See St. Tammany

Manor, Inc. v. Spartan Bldg. Corp., 509 So.2d 424, 426-427 (La.1987) (according to La.Civ.Code Ann. art. 2038, all debts bear interest from the time they are due, unless otherwise stipulated).

[10-12] Next we must decide whose law to apply to determine the rate of prejudgment interest. Prejudgment interest is governed by state law in diversity cases. Concise Oil & Gas Partnership v. Louisiana Intrastate Gas Corp., 986 F.2d 1463, 1472 (5th Cir.1993). A federal court with diversity jurisdiction follows the choice of law rules of the state in which it sits. Sorrels Steel Co. v. Great Southwest Corp., 906 F.2d 158, 167 (5th Cir.1990). Although there is little Louisiana authority on the proper choice of law for prejudgment interest, article 3515 of Louisiana's Civil Code resolves choice of law questions for written instruments, including leases. This provision states

in relevant part: "The form and effect of public and private written instruments are governed by the laws and usages of the places where they are passed or executed." La.Civ.Code Ann. art. 3515. Moreover, the generally held view is that the interest rate for damages for breach of contract is determined by the law of the place where the contract is to be performed. Glazer v. Glazer, 278 F.Supp. 476, 486 (La.1968).

In this case, the leases were executed in Louisiana, and the leased property was located in Louisiana. Execution and performance of the leases occurred in the same state. Therefore, under Louisiana's choice of law rule stated in article 3515 or the principle announced in Glazer, supra, the result is the same. Thus, Louisiana law governs the contractual relationship of Travelers and LEI, including the issue of prejudgment interest.

[13] In Louisiana, "[w]hen the object of performance is a sum of money, damages for delay in performance are measured by the interest on that sum from the time it is due, at the rate agreed by the parties or, in the absence of agreement, at the rate of interest as fixed by Article 2924." La.Civ.Code Ann. art. 2000. Pursuant to this article, Travelers is entitled to prejudgment interest at the rate set out in the leases. The lease terms provided for a "late charge equal to the highest legal interest rate allowable" on delinquent rent payments. Because Louisiana law applies and because the leases failed to include a specific interest rate or method of calculation, Travelers should receive prejudgment interest under La.Civ.Code Ann. art. 2924, as this is "the highest legal rate allowable." See Meyer v. Consolidated Mktg., Inc., 376 So.2d 1278, 1280 (La.Ct.App.1979) (Louisi-

ana courts "have consistently held that in a suit to recover amounts due on a promissory note," the interest rate stipulated in the note applies).[8] Therefore, we remand to calculate prejudgment interest.

2. Postjudgment Interest

[14] Travelers incorrectly contends that it also is entitled to postjudgment interest at Louisiana's legal rate rather than the federal rate. The majority of the circuits have held that the federal postjudgment interest statute, 28 U.S.C. § 1961, applies to "any judgment in a civil case recovered in a district court, . . . including actions based on diversity of citizenship." Chapman & Cole v. Itel

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[8]Even if the leases did not contain a provision concerning a rate of interest, Travelers nevertheless would have been entitled to prejudgment interest pursuant to La.Civ.Code Ann. art. 2924. See T. Cvitanovich Seafoods, Inc. v. Campo, 617 So.2d 964, 965-66 (La.Ct.App.1993), cert. denied, 620 So.2d 847 (La.1993).

Container Int'l B.V., 865 F.2d 676, 689 (5th Cir.1989), cert. denied, 493 U.S. 872, 110 S.Ct. 202, 107 L.Ed.2d 155 (1989) (emphasis in original) (surveying cases). The Fifth Circuit has agreed with this application of section 1961. See id.; Nissho-Iwai Co. v. Occidental Crude Sales, Inc., 848 F.2d 613, 622 (5th Cir.1988).

However, section 1961 fixes the rate of prejudgment interest only when it is a federal question that must be governed by federal law. See, e.g., Cramer v. Association Life Ins. Co., 619 So.2d 821, 826 (La.Ct.App.1993). As already noted, there is no federal statutory rate universally applicable to prejudgment interest. Section 1961, therefore, is used only in the limited circumstances outlined here.

Therefore, a court with diversity jurisdiction awards prejudgment interest according to state law, which in Louisiana is the interest rate set out in article

2924 unless the parties stipulated to a different rate, but calculates postjudgment interest according to the federal rate. See id. at 624. We have addressed the issue of prejudgment interest in the preceding section. Because the district court properly awarded Travelers's postjudgment interest, we leave that part of the judgment undisturbed.

C. Attorney Fees

[15,16] In Louisiana, attorney fees are recoverable only where authorized by statute or contract. See, e.g., Quealy v. Paine, Webber, Jackson & Curtis, Inc., 475 So.2d 756, 763 (La.1985). The lease provision which sets out available remedies upon the lessee's default contains three separate clauses. They are mutually exclusive. Travelers elected to enforce the leases and accelerate the rents and may not now invoke the remaining remedies.

The district court properly refused to award Travelers attorney fees.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART FOR ENTRY OF JUDGMENT AWARDING TRAVELERS PREJUDGMENT INTEREST PURSUANT TO LA.CIV.CODE ANN. ART. 2924.

U.S. COURT OF APPEALS
FILED
APR 20 1994
CHARLES R. FULBRUGE III
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 92-9579

THE TRAVELERS INSURANCE COMPANY,
Plaintiff-Appellee
Cross Appellant,

versus

ST. JUDE HOSPITAL, ETC., ET AL.,
Defendants,

and

ST. JUDE HOSPITAL OF KENNER, LOUISIANA, INC., ST. JUDE MEDICAL OFFICE BUILDING LIMITED PARTNERSHIP, JOHN A. LILJEBERG, ROBERT LILJEBERG, LILJEBERG ENTERPRISES, INC. and KROWN DRUGS, INC.,
Defendants-Appellants
Cross Appellees.

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ST. JUDE HOSPITAL OF KENNER, LA., INC.,
Plaintiffs,

versus

ST. JUDE MEDICAL OFFICE BLDGS. LIMITED PARTNERSHIP,
Defendant-Appellant
Cross-Appellee,

versus

THE TRAVELERS INSURANCE COMPANY,
Defendant-Appellee
Cross-Appellant.

Appeals from the United States District Court for the Eastern District of Louisiana

(CA 90-1983 I C/W 90-2601 I)

Before WIENER, BARKSDALE and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

As the instant appeal and cross appeal are in large part sequels to "Travelers I,"[1] we shall not—in this unpublished per curiam opinion written principally for

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*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

[1]Travelers Ins. Co. v. Liljeberg Enters., Inc., 7 F.3d 1203 (5th Cir. 1993). This case has been referred to from time to time as Liljeberg I as well.

the benefit of the parties—reiterate the facts and procedural history of the controversies before us today. It suffices that the facts set forth in detail by the magistrate judge[2] are sufficient for our purposes. (They also demonstrate, as to Defendants-Appellants John A. and Robert Liljeberg ("the Liljebergs") and St. Jude Hospital, St. Jude Medical Office Building Limited Partnership, Liljeberg Enterprises, Inc. and Krown Drugs, Inc. (collectively, "the Liljeberg entities") as egregious and unconscionable course of bad faith contractual dealings as the members of this panel can recall having encountered.)[3]

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[2]Record Excerpts on Behalf of Travelers Insurance Co., Tab 3, at 4-12.

[3]The Liljeberg conduct to which we refer is the antithesis of that mandated in La. Civ. Code Ann. art. 1983 ("Contracts must be performed in good faith."), and has contributed to the legal effects prescribed in La. Civil Code Ann. art. 1997 ("An obligor in bad faith is liable for all the damages, foreseeable or not,

Upon careful consideration of those facts and the applicable law as reflected in the arguments of counsel, both oral and as written in briefs and supplemental submissions to this court, as well as the contents of the lengthy and tortured record of this case, we conclude that in granting the judgment, grounded in part on the jury verdict rendered at the conclusion of the trial of this cause, the district court committed no reversible error as to the principal demands of Travelers against the Liljebergs and the Liljeberg entities. For the most part, therefore, we affirm that judgment of the district court therein, both in favor of and adverse to Travelers. And we feel no compulsion to write further on that aspect of the instant case, except to observe that, given the concerns expressed by members of

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that are a direct consequence of his failure to perform.").

this panel at oral argument regarding the paucity of record citations in the brief filed on behalf of the Liljebergs, et al.—thereby making those briefs fall woefully short of compliance with Federal Rule of Appellate Procedure 28, particularly of the requirements of FRAP 28(a)(4) and (a)(5)—we were sorely tempted to grant Travelers' motion to dismiss the appeal of Defendants-Appellants for failure to comply with FRAP 28(a) and (e). Even though we have refrained from granting Traveler's motion thus to dismiss, we trust that for future purposes counsel for Defendants-Appellants shall heed this caution well.

Having thus disposed of the contentions of the Liljebergs and Liljeberg entities as appellants, we turn to the contentions of Travelers, as cross-appellant, concerning (1) entitlement to attorney's fees, (2) assessment of costs, and

(3) the appropriate rate to be used in calculating pre-judgment interest. In this regard, we requested and received post-argument supplemental memoranda from the parties addressing the effect of this court's opinion in Travelers I and the "law of the case" doctrine on these cross-appeal issues; and we have carefully considered those submissions as well.

I

ATTORNEY'S FEES

In an act of candor which, in contrast to the briefing and oral argument on behalf of the Liljebergs, we find particularly refreshing, counsel for Travelers concedes that, inasmuch as Travelers I held that Travelers was not entitled to attorney's fees under the Liljeberg Enterprise, Inc. (LEI) leases, the law of the case doctrine precludes Travelers' recovery of attorney's fees here under any least agreement memorialized in such a

document. We thus need not consider the sub-issue of attorney's fees under such leases. But, as Travelers aptly demonstrates, the attorney's fees provisions of the Krown Drugs, Inc. (Krown) lease were neither considered nor ruled on in Travelers I; and that lease document contains an attorney's fees provision significantly different from the one contained in the LEI lease document. Thus the issue of attorney's fees under the Krown lease is not controlled by Travelers I under the law of the case doctrine; it remains fair game for our review.

Section 16.7 of the Krown lease commits the lessee to pay "any reasonable amount incurred by Landlord as attorney's fees." Moreover, the Krown lease document does not contain a tripartite provision akin to the one contained in the LEI leases that we construed in Travelers I. Consequently, Travelers is clearly en-

titled to recover reasonable attorney's fees from Krown Drugs, Inc. as lessee, and from any other co-defendant held liable in solido with Krown Drugs under the judgment of the district court, or from any one or more of them. But, as the applicable contractual provision does not contain a specific formula or percentage for calculating attorney's fees, we are not in a position to determine the proper amount of fees thus to be awarded. Prudence thus dictates that we remand to the district court the fact question of the appropriate amount to be assessed against Krown and its solidary co-judgment debtors as reasonable attorney's fees under the Krown lease.

II

COSTS

Travelers argues on cross-appeal that the district court erred in requiring the respective parties to bear their own

costs. Travelers insists that it was the prevailing party and therefore should not have to bear any costs of the district court litigation. Although we might agree if we were reviewing this issue de novo, that is not the applicable standard of review. Assessment of costs is reviewed for abuse of discretion; and we find no reversible error under that highly restrictive standard of review.

Although Travelers did succeed on many of its claims, it did not succeed totally—at least as to quantum—on each and every one of them. In fact, the jury awarded Travelers significantly less dollars than it sought, and the district court rejected a number of Travelers' asserted causes of action. Thus the district court's determination that Travelers did not prevail sufficiently to be entitled to an award of costs as a matter of law under Federal Rule of Civil Procedure

54(d) cannot be said to constitute an abuse of discretion. We therefore affirm the district court's ruling on the taxing of court costs in this matter.

III

PRE-JUDGMENT INTEREST

We turn finally to the question of the proper rate to be applied in calculating pre-judgment interest, an element of recovery which the jury determined that Travelers was entitled to receive. Travelers' position on this issue is stated in its brief: "[The Liljeberg defendants are] properly liable for all damages flowing from [their] misrepresentation including all unpaid rent and interest at the contract rate . . . . The accrued interest is an integral part of the damages caused by the [defendants], and should not be segregated from the outstanding rental." Travelers argues that Cross-Appellees' contrary position

is, in essence, a red herring intended to obfuscate the solidary liability of those parties by distinguishing the genesis of liability along tort and contractual lines. Our reading of the decision of the Louisiana Supreme Court in Narcise v. Illinois Central Gulf Railroad Co.,[4] to the effect that—regardless of the legal nature of the liability of solidary obligors, i.e., irrespective of the fact that some may be liable in contract and others in tort—each solidary obligor is liable to the obligee for 100% of the indebtedness owed by each other co-obligor, convinces us that Travelers is correct. This includes the propriety under Louisiana law of treating accrued pre-judgment interest as an integral part of the damages necessary to compensate the contractually in-

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[4] 427 So.2d 1192 (La. 1983). See Hoefly v. Government Employees Ins. Co., 418 So.2d 575, 578 (La. 1982).

jured party.[5] These maxims of state law support the proposition that the correct way to calculate post-judgment interest is to apply the proper percentage to the entire amount of damages recovered, including in the instant case not only rent but pre-judgment interest as well. Still, we must here focus not so much on the nature of the pre-judgment interest awards or the sum upon which such interest is to be calculated, but on the appropriate rate of interest to be charged.

Paralleling the situation we analyzed above in connection with attorney's fees, we discern that in the issue of pre-judgment interest a dichotomy resulting from differences in the two different lease forms—LEI and Krown—is produced for purposes of applying the law of the case doctrine. As noted, Travelers I dealt

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[5] See e.g., Trans-Global Alloy Ltd. v. First Nat'l Bank, 583 So.2d 443, 457-58 (La. 1991).

solely with the LEI leases. And, as was the case with attorney's fees, Travelers I contains a direct finding and holding on pre-judgment interest. Still, for law of the case purposes, such holding is applicable only to LEI lease provisions.

Despite Travelers' insistence that the LEI lease document provision calling for "the highest legal rate allowable" should be interpreted to authorize pre-judgment interest at the highest non-usurious rate available for commercial transactions in Louisiana, we cannot disregard the holding in Travelers I that the phrase "the highest legal rate allowable" incorporates by reference Louisiana's legal or judicial rate, determinable under the applicable provision of the Louisiana Civil Code.[6] Clearly, then, we are constrained by the law of the case doctrine to conclude today that pre-judgment inter-

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[6]LA. CIV. CODE ANN. art. 2924.

est on the portion of the district court's damage award to Travelers in the instant case for monies due and owing under the LEI leases should have been calculated in accordance with article 2924 of the Louisiana Civil Code.[7] In other words, we are not at liberty to consider Travelers' argument that the subject LEI lease provision means something different here than we found it to mean in Travelers I. Therefore, on remand, the district court must re-calculate the LEI portion of prejudgment interest accordingly.

Not so, however, for calculating prejudgment interest on monies found to be due and owing to Travelers as a result of breaches of the Krown lease (or, for that matter, any damages awarded to Travelers by the district court in this case other than under the LEI leases). Travelers I dealt solely with the LEI leases, so that

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[7] Id.

its pronouncements regarding pre-judgment interest are limited—for purposes of the law of the case doctrine—to awards arising from LEI lease obligations only. We therefore leave undisturbed the findings and holdings of the district court concerning pre-judgment interest on all portions of the judgment rendered in favor of Travelers other than the portion thereof attributable to the LEI leases. These unaffected portions include, without limitation, awards arising from or connected with the Krown lease.

IV.

CONCLUSION

The judgment of the district court holding the Liljebergs and various of the Liljeberg entities liable in solido to Travelers is affirmed in all respects, subject only to the following two exceptions: (1) To the extent that said judgment failed to award reasonable attorney's

fees to Travelers, payable by some among the Defendants-Appellants/Cross-Appellees in solido, as to all matters in controversy other than the portion of the judgment resulting from liability for rent under the LEI leases, we REVERSE and REMAND for the district court to determine such reasonable attorney's fees and to modify or supplement its judgment accordingly; and (2) to the extent that some of the pre-judgment interest awarded in said judgment was calculated on the portion of the award resulting from delinquencies in the rent accruing under the LEI lease, at a rate or rates other than as specified in article 2924 of the Louisiana Civil Code, we REVERSE and REMAND for the district court to re-calculate pre-judgment interest in accordance with said code article, but only as to the portion of the award arising from the LEI leases; and to modify or supplement its judgment accordingly.

Travelers' motion to dismiss Appellants' appeal, and Travelers' alternative motion to strike Appellants' original and reply briefs, are DENIED. All costs of this appeal are taxed to Defendants-Appellants/ Cross-Appellees (except St. Jude Hospital of Kenner, Louisiana, Inc.) in solido.

U.S. COURT OF APPEALS
FILED

MAY 0 4 1994

CHARLES R. FULBRUGE III
CLERK

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BILL OF COSTS

NOTE: The Bill of Costs is due for filing in this office within 14 days from the date of the opinion, in accordance with Rule 39 F.R.A.P. If a bill of costs is not timely filed in this office, processing can be accomplished only by the filing of a formal motion for leave to file same out of time.

THE TRAVELERS INSURANCE COMPANY v. ST. JUDE HOSPITAL OF KENNER, LA., ET AL. No. 92-9579

The Clerk is requested to tax the following costs against: Defendants/Appellants

COSTS TAXABLE UNDER FRAP & LOCAL RULES 39	REQUESTED				ALLOWED (If different from amount requested)			
	No. of Copies	Pages Per Copy	Cost per Page*	Total Cost	No. of Documents	Pages per Document	Cost per Page*	Total Cost
Docket fee ($100.00)								
Appendix or Record Excerpts	7	91	$.25	$159.25	7	91	.25	159.25
Appellant's Brief								
Appellee's Brief	11	50	$.25	$137.50	11	50	.25	137.50
Appellant's Reply Brief								
Other: Appellee's Reply Brief	11	10	$.25	$ 27.50	11	10	.25	27.50
			Total $ 324.25		Costs are taxed in the amount of $ 324.25			

Costs are hereby taxed in the amount of $ 324.25 this 31st day of May 1994

CHARLES R. FULBRUGE III, CLERK

By: Debbie Madere
Deputy Clerk

State of
County of Orleans

I Brent B. Barriere, do hereby swear under penalty of perjury that the services for which fees have been charged were incurred in this action and that the services for which fees have been charged were actually and necessarily performed. A copy of this Bill of Costs was this day mailed to opposing counsel, with postage fully prepaid thereon. This 4th day of May 1994

Brent B. Barriere
(Signature)

A-139

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U.S. DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT
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May 31, 1994

Ms. Loretta G. Whyte
Clerk of Court
U.S. District Court
500 Camp Street, Room C-151
New Orleans, LA 70130

No. 92-9579 Travelers v. St. Jude
(D.C. No. CA-90-1983 I c/w 90-2601-I)

(X) Enclosed is a certified copy of the judgment issued as the mandate.

( ) Enclosed is a certified copy of the Local Rule 47.6 Decision issued as the mandate.

( ) Motion for stay of mandate has been denied.

( ) Enclosed is a certified copy of the judgment issued as the mandate.

( ) Supreme Court order denying certiorari has been received.

( ) Enclosed is a certified copy of the judgment issued as the mandate.

( ) The judgment issued as mandate was previously sent to your office.

(X) Copy of the Court's opinion enclosed.

(X) Record/original papers/exhibits are:

( )Volumes ( )Returned (X)To be returned
( )Envelopes( )Returned (X)To be returned
( )Boxes ( )Returned ( )To be returned

(X) Approved Bill of Costs enclosed.

(X) Copy to counsel enclosed.

Sincerely,
CHARLES R. FULBRUGE III, Clerk

By: /s/ [Signature not Legible]
Deputy Clerk

cc: Mr. Kenneth C. Fonte
Mr. Brent B. Barriere
Judge Henry A. Mentz

U.S. DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
FILED JUN - 6 1994
LORETTA G. WHYTE

U.S. COURT OF APPEALS
FILED
APR 20 1994
CHARLES R. FULBRUGE III
CLERK

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-9579

D.C. Docket No. CA 90-1983 I
c/w 90-2601 I

THE TRAVELERS INSURANCE COMPANY,
Plaintiff-Appellee
Cross-Appellant,

versus

ST. JUDE HOSPITAL, ETC., ET AL.,
Defendants,

and

ST. JUDE MEDICAL OFFICE BLDG.,
LIMITED PARTNERSHIP, ET AL.,
Defendants-Appellants
Cross-Appellees.

****

ST. JUDE HOSPITAL OF KENNER, LA, INC.,
Plaintiff,

versus

ST. JUDE MEDICAL OFFICE BLDGS.
LIMITED PARTNERSHIP,
Defendant-Appellant
Cross-Appellee,

versus

THE TRAVELERS INSURANCE COMPANY,
Defendant-Appellee
Cross-Appellant.

Appeals from the United States District Court for the Eastern District of Louisiana

Before WIENER, BARKSDALE and EMILIO M. GARZA, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause holding the Liljebergs and various of the Liljeberg entities liable in solido to Travelers is affirmed in all respects, subject only to the following two exceptions: (1) the extent that said judgment failed to award reasonable attorney's fees to Travelers, payable by some among the Defendants-Appellants/Cross-Appellees in solido, as to all matters in controversy other than the portion of the judgment resulting from liability for rent under the LEI leases, this cause is reversed and remanded for the District Court to determine such reasonable attorney's fees and to modify or supplement its judgment accordingly; and (2) to the extent that some of the pre-judgment interest awarded resulting from delinquencies in the rent accruing under the LEI lease, at a rate or rates other than as specified in article 2924 of the Louisiana Civil Code, this cause is reversed and remanded for the district court to recalculate pre-judgment interest in accordance with said code article, but only as to the portion of the award arising from the LEI leases; and to modify or supplement its judgment accordingly.

IT IS FURTHER ORDERED that all costs of this appeal are to be taxed to defendants-appellants/cross-appellees (except St. Jude Hospital of Kenner, Louisiana, Inc.) in solido.

April 20, 1994

ISSUED AS MANDATE: MAY 31 1994

A true copy

Teste
Clerk, U.S. Court of Appeals, Fifth Circuit

By /s/ [Signature not Legible]
Deputy

New Orleans Louisiana MAY 31 1994

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
OCT 21 11 21 AM '94
LORETTA G. WHYTE
CLERK

DATE OF ENTRY OCT 21 1994

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

TRAVELERS INSURANCE COMPANY	CIVIL ACTION
VERSUS	NO. 90-1983 C/W 90-2601
ST. JUDE HOSPITAL OF KENNER LA, INC., ET AL	SECTION "I" (1)

ORDER AND REASONS

Before the Court is a Motion filed by Defendants, St. Jude Hospital, et al, to Vacate Writ of Execution Issued Contrary to Law and to Enjoin Marshal from Executing Unlawful Writ and to Fix Amount Due by St. Jude Medical Office Buildings Limited Partnership Pursuant to Paragraphs 2 and 4 of the Amended Judgment, and a Memorandum in Opposition filed by Plaintiffs, Travelers Insurance Company. This Writ of

Execution was issued by the Clerk, United States District Court, Eastern District of Louisiana, directing the United States Marshal to seize and sell certain immovable property owned by St. Jude Hospital and St. Jude Medical Office Building Limited Partnership to satisfy the December 2, 1992 Amended Judgment entered in this case in favor of Travelers. St. Jude Hospital was subsequently found liable as the general partner of the St. Jude Medical Office Building Limited Partnership for the indebtedness of the Partnership under the 1992 Amended Judgment.[1]

The Partnership and other defendants appealed these judgments to the United States Court of Appeals for the Fifth Circuit. Travelers cross-appealed the 1992 Amended Judgment, seeking its attor-

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[1] see Travelers Insurance Company v. St. Jude Hospital of Kenner, LA, Inc., Civil Action No. 93-0173, United States District Court, Easter District of Louisiana.

neys fees and costs under F.R.C.P. 54(d). The Fifth Circuit affirmed the 1992 Amended Judgment in all respects other than to direct this Court to confirm that certain pre-judgment interest was calculated on the basis of Louisiana judicial interest rates and to direct this Court to award reasonable attorneys fees to Travelers.

1. Motion to Vacate Writ of Execution Issued Contrary to Law

Defendants seek to vacate the Writ of Execution (fieri facias) issued by the Clerk of Court directing the United States Marshal to seize and sell certain immovable property known as Parcels B-2 and B-3, Loyola University subdivision, Kenner, Louisiana. Defendants argue that the Writ directs the Marshal to recover a sum which exceeds the amount owed by St. Jude Medi-

cal Office Buildings Limited Partnership ("the Partnership").[2]

Specifically, Defendants argue that the Writ is improper because it directs the Marshal to satisfy Plaintiffs costs and attorneys fees, and overstates the amount owed by the Partnership under Paragraphs 2 and 4 of the Amended Judgment. The Court will address each of these arguments in turn.

The Partnership suggests that Travelers is not entitled to any costs in the above action. This Court refused to award Travelers costs against the Partnership for the district court proceedings, and this decision was affirmed by the Fifth Circuit in its April 20, 1994 decision and subsequent mandate. However, the Fifth Circuit did award Travelers its costs

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[2]St. Jude has filed an identical motion in Civil Action No. [sic] No. 93-0173 requesting the same relief concerning the seizure and sale of Parcel A, which constitutes the St. Jude Hospital.

incurred in prosecuting the appeal of this matter, said costs totalling $324.25.[3] Therefore, the Writ of Execution properly includes this amount.

Next, the Partnership contends that the Writ improperly includes an amount awarded as attorneys fees as premature. The Fifth Circuit mandate directed the district court to award attorneys fees in favor of Travelers with respect to the Krown Drug Lease.[4] The Court subsequently

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[3]In its Conclusion, the Fifth Circuit stated:

> All costs of this appeal are taxed to Defendants-Appellants/Cross-Appellees (except St. Jude Hospital of Kenner, Louisiana, Inc.) in solido.

[4]The Fifth Circuit specifically addressed this issue on page 5 of its opinion:

> Consequently, Travelers is clearly entitled to recover reasonable attorney's fees from Krown Drugs, Inc. as lessee, and from any other co-defendant held liable in solido with Krown Drugs under the judgment of the district court, or from any one or more of them. But, as the applicable contractual provision does not contain a specific

referred the matter to the Magistrate Judge to determine a reasonable attorneys fees amount. Magistrate Judge Lemelle, after reviewing the billing records and taking testimony, awarded attorneys fees to Travelers in the amount of $499,504.77. In its Minute Entry of October 20, 1994, this Court adopted the Magistrate Judge's Findings as its own, and amended the Amended Judgment to reflect same. Therefore, the Writ of Execution properly includes this amount.

Finally, the Partnership argues that the Writ overstates the amount of the Partnership's indebtedness to Travelers

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> formula or percentage for calculating attorney's fees, we are not in a position to determine the proper amount of fees thus to be awarded. Prudence thus dictates that we remand to the district curt [sic] the fact question of the appropriate amount to be assessed against Krown and its solidary co-judgment debtors as reasonable attorney's fees under the Krown lease.

pursuant to Paragraphs 2 and 4 of the Amended Judgment by some $5.4 million dollars. As to the calculation of principal and interest in Paragraph 2, this discrepancy results from the Partnership's erroneous belief that it is not liable for interest at the contractual rate provided in the lease. However, Krown Drugs and the Partnership are solidarily liable for unpaid rent due under the lease between Krown and the Partnership, which lease was assigned to Travelers. Since Krown Drugs is liable for interest at the contractual rate, the Partnership, as solidary obligor with Krown Drugs, is likewise liable for interest at the contractual rate. Narcise v. Illinois Central Gulf Railroad Co., 427 So.2d 1192 (La. 1983). As the Fifth Circuit affirmed the district court and found that Travelers is entitled to collect from

any one solidary obligor all damages due[5], the Writ properly includes the contract

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[5]The Fifth Circuit specifically addressed this claim on page 6 of its opinion dated April 20, 1994. There the Court noted:

> We turn finally to the question of the proper rate to be applied in calculating pre-judgment interest, an element of recovery which the jury determined that Travelers was entitled to receive. Travelers' position on this issue is stated in its brief: "[The Liljeberg defendants are] properly liable for all damages flowing from [their] misrepresentation including all unpaid rent and interest at the contract rate... The accrued interest is an integral part of the damages caused by the [defendants], and should not be segregated from the outstanding rental." Travelers argues that Cross-Appellees' contrary position is, in essence, a red herring intended to obfuscate the solidary liability of those parties by distinguishing the genesis of liability along tort and contractual lines. Our reading of the decision of the Louisiana Supreme Court in Narcise v. Illinois Central Gulf Railroad Co., to the effect that -- regardless of the legal nature of the liability of solidary obligors, i.e. irrespective of the fact that some may be liable in contract and others in tort -- each solidary obligor is liable to the obligee for 100% of the indebtedness owed by each other co-obligor, convinces us that Travelers is correct.

rate of interest specified in the Krown Drug lease, which principal and interest totals $7,198,405.

The Partnership also argues that the amount owed to Travelers pursuant to Paragraph 4 of the Amended Judgment is overstated in the Writ. However, the parties' calculations under this Paragraph are essentially the same. As Defendants' Exhibit A aptly demonstrates, because the Amended Judgment did not allow the recovery of post-judgment interest on any prejudgment interest, the total sum due under this Paragraph for waste of collateral is $286,475.98. Therefore, the Writ properly includes this amount.

For the reasons stated above, this Court denied Defendants' motion to vacate the Writ of Execution, as these amounts included in the Writ are properly owed by the Partnership to Travelers.

2. Motion to Enjoin Marshal from Executing Unlawful Writ

Defendants' motion to enjoin the Marshal from executing the Writ is denied. For the reasons stated above, this Court finds that the Writ of Execution is proper and correct. Further, the Writ does not comply with the requirements of LSA - R.S. 13:4283 in stating the amount the Partnership owed to Travelers.

3. Motion to Fix Amounts Due by St. Jude Medical Office Building Limited Partnership Pursuant to Paragraphs 2 and 4 of the Amended Judgment

Considering the calculations and reasons for those calculations enunciated above, the amount owed by the Partnership to Travelers Insurance Company pursuant to Paragraphs 2 and 4 of the Amended Judgment of December 2, 1992 and including appeals

costs, credits, and attorneys fees totals $7,784,385.75.

Accordingly,

IT IS ORDERED that Motion of Defendants, St. Jude Hospital of Kenner, LA, Inc., et al to:

(1) Vacate Writ of Execution Issued Contrary to Law is DENIED;

(2) Enjoin Marshal from Executing Unlawful Writ is DENIED; and

(2) Fix Amount Due by St. Jude Medical Office Buildings Limited Partnership Pursuant to Paragraphs 2 and 4 of the Amended Judgment is GRANTED IN PART, in that amount owed by St. Jude Medical Office Building Limited Partnership, pursuant to Paragraphs 2 and 4 of the Amended Judgment, and including appeals costs, credits, and attorneys fees is fixed at $7,784,385.75.

New Orleans, Louisiana this 20th day of October, 1994.

/s/ Henry A. Mentz, Jr.
UNITED STATES DISTRICT JUDGE

U.S. DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
FILED *NOV* - 3 1994
LORETTA G. WHYTE
CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

THE TRAVELERS INSURANCE COMPANY	CIVIL ACTION
VERSUS	NO. 93-173
ST. JUDE HOSPITAL OF KENNER, LOUISIANA, INC.	SECTION: I (4)

SECOND AMENDED JUDGMENT

Considering the Court's Minute Entry, dated October 20, 1994, fixing the amount due by defendant, St. Jude Hospital of Kenner, Louisiana, Inc., the Amended Judgment, entered August 12, 1993, is further amended to add the following paragraph:

IT IS ORDERED, ADJUDGED AND DECREED that judgment be, and the same hereby is rendered nunc pro tunc as of October 20, 1994, in favor of plaintiff, The Travelers Insurance Company, and against defendant,

St. Jude Hospital of Kenner, Louisiana, Inc., in the amount of $7,784,385.75 (Seven Million, Seven Hundred Eighty-Four Thousand, Three Hundred Eighty-Five and 75/100 Dollars).

New Orleans, Louisiana, this 3rd day of November, 1994.

/s/ Henry A. Mentz, Jr.
UNITED STATES DISTRICT JUDGE

DATE OF ENTRY NOV 03 1994

F I L E C O P Y

Notice sent to:

Brent Bennett Barriere, Esq.
Kenneth Charles Fonte, Esq.
William F. Wessel, Esq.
Moise S. Steeg Jr., Esq.

(2)

Supreme Court, U.S.
FILED
OCT 20 1995
CLERK

No. 95-310

In The

Supreme Court of the United States

October Term, 1995

ST. JUDE HOSPITAL OF KENNER, LOUISIANA, INC., ST. JUDE MEDICAL OFFICE BUILDINGS LIMITED PARTNERSHIP and KROWN DRUGS, INC.,

Petitioners,

vs.

THE TRAVELERS INSURANCE COMPANY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court on remand departed from the accepted and usual course of judicial proceedings by calculating interest in accordance with the opinion of the court of appeals and the Louisiana law of solidary obligations?

2. In view of the power of a court of appeals to interpret its mandates, whether the court of appeals sanctioned a departure by the district court from the accepted and usual course of judicial proceedings by affirming the district court's calculation of interest in accordance with its prior ruling and the Louisiana law of solidary obligations?

STATEMENT UNDER RULE 29.6

In accordance with Rule 29.6 of the Supreme Court, respondent, The Travelers Insurance Company, advises that its parent, The Travelers Corporation, has issued shares of common and preferred stock to the public. Respondent further advises that it has no subsidiaries whose stock is publicly traded.

TABLE OF CONTENTS

	Page
Questions Presented	i
Statement Under Rule 29.6	ii
Table of Contents	iii
Table of Citations	iv
Statement of Jurisdiction	2
Statutory Provisions Involved	2
Statement of the Case	2
A. Factual Background	2
B. Procedural Background	4
Reasons for Denying the Writ	8
I. The Decision Of The Court Of Appeals Did Not Substantially Depart Or Sanction A Departure From The Usual Course Of Proceedings Because The Court Of Appeals' Ruling On The Louisiana Law Of Solidary Liability Entitled Travelers To The Second Amendment Judgment.	9
II. This Court Should Not Adhere To The Petitioners' Mechanistic Application Of The Law Of The Case Doctrine And Intervene In This Louisiana Collection Suit.	14

Contents

Page

A. Petitioners Ignore The Discretionary Nature Of The Law Of The Case Doctrine. 15

B. Petitioners Ignore That The Courts Of Appeals Possess The Power To Interpret And Recall Any Mandate. 16

C. This Case Is Not Worthy Of Supervisory Review By The Court. 17

Conclusion 18

TABLE OF CITATIONS

Cases Cited:

Arizona v. California, 460 U.S. 605, 103 S. Ct. 1382, 75 L. Ed. 2d 319 (1983) 15

Browning v. Navarro, 887 F.2d 553 (5th Cir. 1989) 15, 16

Burton v. Johnson, 975 F.2d 690 (10th Cir. 1992), *cert. denied* __ U.S. __, 113 S. Ct. 1879, 123 L. Ed. 2d 497 (1993) 16

Home Life Ins. Co. v. Equitable Equip. Co., 694 F.2d 402 (5th Cir. 1982) 16, 17

In re Cajun Electric Power Co-op, Inc., 791 F.2d 353 (5th Cir. 1986) 16

Contents

	Page
In re Evangeline Refining Co., 890 F.2d 1312 (5th Cir. 1989)	15
In re Incident Aboard the D/B OCEAN KING on August 30, 1980, 877 F.2d 322 (5th Cir. 1989)	17
In re Ivan F. Boesky Sec. Litig., 957 F.2d 65 (2nd Cir. 1992)	16
In re Sanford Fork & Tool Co., 160 U.S. 247, 16 S. Ct. 291, 40 L. Ed. 414 (1895)	16
Messinger v. Anderson, 225 U.S. 436, 32 S. Ct. 739, 56 L. Ed. 1152 (1912)	15
Narcise v. Illinois Cent. Gulf R.R., 427 So. 2d 1192 (La. 1983)	11, 12
Payne v. O'Quinn, 565 So. 2d 1049 (La. App. 3rd Cir. 1990)	10
St. Jude Hospital of Kenner, La., Inc. v. Travelers Ins. Co., __ U.S. __, 115 S. Ct. 1696, 131 L. Ed. 2d 559 (1995)	3
Travelers Ins. Co. v. Liljeberg Enterprises, Inc., 38 F.2d 1404 (5th Cir. 1994)	2
Travelers Ins. Co. v. St. Jude Hospital (5th Cir. 1994) (92-9579; unpublished)	7
Travelers Ins. Co. v. St. Jude Hospital of Kenner, La., Inc., 21 F.3d 1107 (5th Cir. 1994)	7

Contents

	Page
Travelers Ins. Co. v. St. Jude Hospital of Kenner, La., Inc., 37 F.3d 193 (5th Cir. 1994)	2
Travelers Ins. Co. v. St. Jude Hospital of Kenner, La., Inc., 56 F.3d 1386 (5th Cir. 1994)	8
Travelers Ins. Co. v. St. Jude Hospital of Kenner, La., Inc. (E.D. La. 1992) (No. 90-1983 c/w 90-2601; unpublished)	6, 7
United States v. McClain, 593 F.2d 658 (5th Cir.), *cert. denied*, 444 U.S. 918, 100 S. Ct. 234, 62 L. Ed. 2d 173 (1979)	15
Statute Cited:	
28 U.S.C. §1254(1)	2
Rules Cited:	
Fifth Circuit Rule 41.2	16
Supreme Court Rule 10.1(a)	14
Supreme Court Rule 29.6	ii
Other Authorities Cited:	
S. Litvinoff, *5 Louisiana Civil Law Treatise* § 7.68 (1992)	11

Contents

	Page
La. Civ. Code art. 1794	2, 10
La. Civ. Code art. 1797	2, 10
La. Civ. Code art. 2921	8
La. Civ. Code art. 2924	7

APPENDIX

Appendix A — Relevant Statutes and Rule	1a

No. 95-310

In The

Supreme Court of the United States

October Term, 1995

ST. JUDE HOSPITAL OF KENNER, LOUISIANA, INC., ST. JUDE MEDICAL OFFICE BUILDINGS LIMITED PARTNERSHIP, AND KROWN DRUGS, INC.,

Petitioners,

vs.

THE TRAVELERS INSURANCE COMPANY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE SUPREME COURT:

The Travelers Insurance Company ("Travelers" or "Respondent"), through its undersigned counsel, respectfully requests this Court to deny the petition for a writ of certiorari submitted by petitioners, St. Jude Hospital of Kenner, Louisiana, Inc. ("St. Jude Hospital"), St. Jude Medical Office Buildings

Limited Partnership (the "Partnership"), and Krown Drugs, Inc. ("Krown") (collectively, the "Petitioners").

STATEMENT OF JURISDICTION

28 U.S.C. §1254(1) confers jurisdiction on this Court to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on May 24, 1995.

STATUTORY PROVISIONS INVOLVED

This petition involves issues of the Louisiana law of solidary obligations and requires interpretation of articles 1794 and 1797 of the Louisiana Civil Code. Respondent includes these articles in its appendix.

STATEMENT OF THE CASE

A. Factual Background

This is a Louisiana collection suit brought to compel the Partnership as a solidary obligor to pay a judgment. Focusing on narrow issues of discretionary procedure, Petitioners ask the Court to review a substantively correct decision of the court of appeals. This kind of "picayune" appellate effort by Petitioners against Travelers has been typical — in the last five years, Petitioners' litigation machinery has generated at least four separate civil actions, two Chapter 11 proceedings, and six collateral actions challenging various judgments in favor of Travelers. *See, e.g., Travelers Ins. Co. v. St. Jude Hospital of Kenner, La., Inc.*, 37 F.3d 193, 194 n.3 (5th Cir. 1994). The Fifth Circuit has repeatedly commented on the "continuing" litigation marked by Petitioners' repeated, belated and "extremely intemperate" pleadings. *Travelers Ins. Co. v. Liljeberg Enterprises, Inc.*, 38 F.2d 1404, 1405 (5th Cir. 1994). Indeed, this Court recently denied a previous certiorari effort by an affiliate of

Petitioners, St. Jude Hospital of Kenner, La., Inc. *St. Jude Hospital of Kenner, La., Inc. v. Travelers Ins. Co.*, __ U.S. __, 115 S. Ct. 1696, 131 L. Ed. 2d 559 (1995). Travelers shows below why this latest attempt should also be denied.

St. Jude Hospital was founded by John and Robert Liljeberg to develop an acute care hospital in Kenner, Louisiana in 1983. Needing to provide office space for the hospital physicians, St. Jude Hospital formed a Louisiana limited partnership, the St. Jude Medical Office Buildings Limited Partnership, and donated property adjacent to the hospital to the Partnership for the construction of the St. Jude Medical Office Building (the "MOB"). In consideration of that transfer, St. Jude Hospital was named the Partnership's sole general partner.

Another entity controlled by the Liljebergs, Liljeberg Enterprises, Inc. ("LEI"), initially leased space in the MOB from the Partnership in an agreement dated May 1, 1985. Under this first lease, LEI rented 11,893 square feet of the building for a ten-year term from August 1, 1985, to July 31, 1995, at a monthly rate of $14,866.25. The Partnership was authorized to grant a mortgage on the MOB to an "Institutional Mortgagee," defined to include insurance companies like Travelers. On May 1, 1987, LEI entered into a second lease with the Partnership for an additional 1,800 square feet in the MOB. This lease was for a five-year term and had a monthly rental of $2,250; it was identical in form as to the first lease.[1] Still another entity controlled by the Liljebergs, Krown, executed a lease with the Partnership for space in the MOB.[2]

On October 10, 1985, Travelers loaned the Partnership $25,000,000. Of that loan amount, approximately $19,000,000

1. Travelers refers to the May 1, 1985, LEI lease and the May 1, 1987, LEI lease collectively as the "LEI Leases."

2. Travelers refers to this lease as the "Krown Lease."

was used to pay the construction lender and the balance of $6,000,000 was retained by the Partnership. To secure the debt, the Partnership granted a real and chattel mortgage that encumbered the MOB, its improvements (including tenant improvements), and all "corporeal movables" — personal property of any type owned by the Partnership and located at the MOB. The Partnership also granted to Travelers an assignment of all of the Partnership's rights under any leases of space in the MOB. Included among the assigned leases were the LEI Leases and the Krown Lease.

During the next five years, the Partnership used Travelers' funds to make loans to its affiliates, LEI and Krown, and its insiders, the Liljebergs, and to pay a portion of the interest owed to Travelers. Although the Partnership repeatedly represented to Travelers that it timely collected all rents, the Partnership permitted Krown and LEI to avoid payment of rent owned under the leases assigned to Travelers. By early 1990, the Partnership had exhausted the funds loaned by Travelers, and the Partnership quickly defaulted in repayment of the loan. Travelers demanded payment of the loan. The Partnership, St. Jude Hospital and the Liljebergs responded with threats to render the MOB uninhabitable by terminating water service and blocking its sewerage and storm drainage system, which ran under neighboring property owned by St. Jude Hospital. When Travelers indicated that it would pursue foreclosure, the Partnership, Liljebergs and LEI responded by stripping tenant improvements from the MOB.

B. Procedural Background

Faced with the destruction of its collateral and the Partnership's refusal to cure its default, Travelers instituted this case, a diversity action in the United States District Court for the Eastern District of Louisiana, against the Partnership, St. Jude Hospital, LEI, Krown, and the Liljebergs (the "Partnership Litigation").

Travelers' suit involved several claims. The first claim concerned the Partnership's March of 1990 default of the promissory note executed in favor of Travelers in October of 1985, which was secured by the real and chattel mortgage executed by the Partnership. Another claim related to Travelers' exercise of its assigned rights under the LEI Leases and the Krown Lease. The third claim referenced the Liljeberg's threats to terminate water and sewage service to the MOB in the Spring of 1990. The fourth claim arose from the Liljebergs' clandestine removal of furniture, fixtures and equipment from the MOB in late May of 1990. The final claim involved environmental damage to the real estate encumbered by Travelers' mortgage. Travelers also requested attorneys' fees and costs. Significantly, Travelers asserted a solidary theory of liability against the Partnership and Krown for the unpaid rent of Krown for tortious misrepresentation (against the Partnership) and breach of contract (against Krown).

The district court entered a partial summary judgment in favor of Travelers recognizing and enforcing its real and chattel mortgage liens in and to the MOB and movable property and authorized their judicial sale. After a trial on the merits of the remaining claims, the Court entered a judgment dated August 18, 1992 (the "Judgment").[3] At paragraph 2 of that ruling, the district court ruled that the Partnership and Krown were solidarily liable. The Partnership filed a motion for new trial or, alternatively, to alter the Judgment. The district court entered an amended judgment on December 3, 1992 (the "First Amended Judgment").[4] Significantly, in the order and reasons for the First

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3. Petitioners' Appendix, pp. A-33 to A-50 (hereinafter, "P. App.").

4. P. App., pp. A-78 to A-95. The Court rendered an opinion in connection with the First Amended Judgment. P. App., pp. A-51 to A-77.

(Cont'd)

Amended Judgment, the district court reiterated the solidary liability of the Partnership with Krown:

> This Civil Code article sets forth one of the effects of solidary obligations in Louisiana. If it applies to these parties, it will do so at the time Travelers executes whatever final judgment results from these proceedings. It does not change the result obtained herein. The judgment correctly states that MOB, being liable for the same damages as LEI and Krown, is solidarily liable with them. Therefore, the Court finds no error in paragraphs 1 and 2 of the judgment so as to warrant any amendment.

P. App., p. A-65.

Because the Partnership's *individual* liability arose from a claim of tortious misrepresentation, the district court amended the Judgment to reflect the source of that individual liability concerning interest. The First Amended Judgment in no way modified the Partnership's status as a solidary obligor with Krown. Petitioners contend that the First Amended Judgment "reflected the court's adoption of the Partnership's position that it was liable for interest on the judgment at the judicial rate, rather than the contractual rates specified in the LEI and the Krown Leases."[5] Travelers disputes this contention. As shown above, the order and reasons accompanying the First Amended Judgment explicitly recognized the solidary nature of the

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(Cont'd)

Travelers Ins. Co. v. St. Jude Hospital of Kenner, La., Inc. (E.D. La. 1992) (No. 90-1983 c/w 90-2601; unpublished).

5. Petitioners' brief, p. 6.

Partnership's debt to Travelers and, accordingly, the prospect of recovery against the Partnership for all amounts owed by Krown.

The First Amended Judgment was appealed by both parties. Noting that the commercial activities of the Partnership, St. Jude Hospital, LEI, Krown, and the Liljebergs constituted an "egregious and unconscionable course of bad faith contractual dealings as the members of this panel can recall having encountered," the court of appeals issued an opinion concerning the First Amended Judgment on April 20, 1994.[6] The court of appeals affirmed the district court except to remand the case (1) to supplement the First Amended Judgment to quantify an award to Travelers of its reasonable attorneys' fees and (2) to determine the appropriate rate used in calculating pre-judgment interest on the *LEI Leases* in accordance with article 2924 of the Louisiana Civil Code. The Fifth Circuit issued a mandate on May 31, 1994.[7] In accordance with the court of appeals' instructions on remand, the district court in order and reasons issued on October 21, 1994, quantified Travelers' reasonable attorneys' fees and determined that the prejudgment interest on the LEI Leases had been properly calculated at the judicial rate.[8]

On November 3, 1994, the district court entered its second amended judgment (the "Second Amended Judgment") in the amount of $7,784,385.75. This figure appropriately included

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6. P. App., pp. A-122 to A-139. *Travelers Ins. Co. v. St. Jude Hospital of Kenner, La., Inc.*, 21 F.3d 1107 (5th Cir. 1994). Petitioners refer to this ruling in their petition as "Travelers II."

7. P. App., pp. A-140 to A-144. *Travelers Ins. Co. v. St. Jude Hospital* (5th Cir. 1994) (92-9579; unpublished).

8. P. App., pp. A-145 to 156. *Travelers Ins. Co. v. St. Jude Hospital of Kenner, La., Inc.* (E.D. La. 1994) (No. 90-1983 c/w 90-2601; unpublished).

prejudgment interest on the award given in connection with the Krown Lease at the contractual rate pursuant to the provision in the First Amended Judgment that the Partnership be solidarily liable with Krown.[9] On appeal, the court of appeals affirmed the district court's Second Amended Judgment.[10] The court of appeals found unpersuasive the Partnership's arguments that the Second Amended Judgment conflicted with the decision of the court of appeals rendered in other litigation.[11] Petitioners filed their petition for a writ of certiorari with this Court on or about August 20, 1995.

REASONS FOR DENYING THE WRIT

The legal issues presented by the petition do not warrant the attention of the Court. This proceeding does not involve a conflict in the circuits, raises no unresolved issue of federal law, relates solely to Louisiana legal issues, and affects only the litigants involved in this case. In this case, pursuant to the Louisiana law of solidary obligations, Travelers obtained a judgment against the Partnership and Krown as solidary obligors

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9. P. App., pp. A-157 to A-159.

10. P. App., pp. A-1 to A-12. *Travelers Ins. Co. v. St. Jude Hospital of Kenner, La., Inc.*, 56 F.3d 1386 (5th Cir. 1994). Petitioners refer to this ruling as "Travelers III."

11. In an apparent attempt to obfuscate the issues to be considered here, Respondents refer the Court to proceedings involving the LEI Leases (the "Lease Litigation"). (Petitioners refer to this ruling as "Travelers I".) Travelers is confused by these references. The Lease Litigation involved the LEI Leases, which were distinct from the Krown Lease at issue in the Partnership Litigation: The LEI Leases required prejudgment interest at the legal rate stated in article 2921 of the Louisiana Civil Code and the Krown Lease at issue in this case involved interest calculated at a contractual rate. This reference to the Lease Litigation is a classic "red herring" that the Court should ignore.

and collected from the Partnership the amount owed by Krown. The court of appeals adhered to the law of the case in authorizing this course of action; indeed, Petitioners do not dispute that the calculation of interest owed under the Krown Lease was incorrectly calculated or that the lower courts improperly found the Partnership and Krown to be solidary obligors. In essence, Petitioners ignore the substantive correctness of the opinion of the court of appeals and ask the Court to bind the Fifth Circuit with "hypertechnical handcuffs" based on an overly narrow reading of the law of the case doctrine and the rule of mandate. In filing their petition, Petitioners ignore the discretionary nature of the law of the case doctrine and the power of a court of appeals to interpret its prior mandates. For these reasons, which Travelers sets forth more fully below, the Court should deny the petition for a writ of certiorari.

I.

THE DECISION OF THE COURT OF APPEALS DID NOT SUBSTANTIALLY DEPART OR SANCTION A DEPARTURE FROM THE USUAL COURSE OF PROCEEDINGS BECAUSE THE COURT OF APPEALS' RULING ON THE LOUISIANA LAW OF SOLIDARY LIABILITY ENTITLED TRAVELERS TO THE SECOND AMENDED JUDGMENT.

Petitioners' blind adherence to the discretionary law of the case doctrine stampedes another, more established principle, federalism. Petitioners, particularly the Partnership, completely ignore the fact that, as a matter of state law in this diversity case, Travelers was entitled to obtain a judgment against the Partnership and Krown under a solidary theory of liability and under that theory collect from the Partnership the amount owed by Krown. The district court, in rendering the Second Amended Judgment, understood this, as did the court of appeals when it

affirmed the Second Amended Judgment in accordance with its prior rulings.

As a matter of Louisiana law, Travelers was entitled to collect from the Partnership the amount owed by Krown to Travelers. The Louisiana Civil Code and the decisions of Louisiana state courts definitively establish that a claimant may obtain a judgment against solidary obligors and may collect from either what the other owes — even if the liability of each solidary obligor arises from different sources. The decisions of the courts below properly reflect this state law.

Article 1794 of the Louisiana Civil Code states as follows:

> *An obligation is solidary for the obligors when each obligor is liable for the whole performance.* A performance rendered by one of the solidary obligors relieves the others of liability toward the obligee.

(Italics added.) "An obligation may be solidary though it derives from a different source for each obligor." La. Civ. Code. art. 1797. *See also, Payne v. O'Quinn*, 565 So.2d 1049 (La. App. 3rd Cir. 1990). One commentator has stated in that vein:

> In other words, it does not matter whether the obligation is conventional for each obligor, or whether all obligors are at fault, or whether only one is at fault while the liability of the other is only vicarious, provided that each obligor is bound to render the whole of one and the same performance and to do so in such a way that performance by one will extinguish the obligation of all *vis-á-vis* the obligee.

S. Litvinoff, *5 Louisiana Civil Law Treatise* §7.68 (1992)(footnote omitted).

The Louisiana Supreme Court in *Narcise v. Illinois Cent. Gulf R.R.*, 427 So.2d 1192 (La. 1983), expounded upon the underpinning of solidary liability and confirmed that parties may be liable solidarily though their individual liability arises from entirely different duties. In this regard, the Supreme Court opined as follows:

> Article 2092 [now Article 1797] specifically provides that an "obligation may be *in solido* although one of the debtors be obliged differently from the other, to the payment of one and the same thing." It is the coextensiveness of the obligations for the same debt, and not the source of liability, that determines the solidarity of the obligation.... The fact of different defenses, different prescriptive periods, different beneficiaries in some cases, and different elements of damages does not detract from the *in solido* nature of the obligation of the two debtors. These factors may be significant in determining the existence and extent of the liability of each debtor toward the plaintiff. However, once the extent of each debtor's liability has been determined, there is an *in solido* obligation as to their common liability to the injured party. *While one item of damages may be recoverable against one debtor and not the other, the parties are liable* in solido *as to every item for which plaintiff can compel payment from either.*

Id. at 1195 (italics added).

As the lower courts properly understood, the Supreme Court ruling in *Narcise* dictates that the Partnership is liable for the same damages as its solidary obligor, Krown. Those damages include contractual interest owed by Krown under the Krown Lease. Although the Partnership may have some right of reimbursement from Krown, the Partnership is liable as a solidary obligor for the entire amount of Krown's damages to Travelers.

The court of appeals properly understood this when it expressly stated that Travelers is free to collect from one solidary obligor all damages due Travelers from any of the solidary obligors. In its April 20, 1994, opinion, which formed the basis for its May 31, 1994, mandate, the court of appeals specifically noted this aspect of Louisiana law:

> We turn finally to the question of the proper rate to be applied in pre-judgment interest, an element of recovery which the jury determined that Travelers is entitled to receive. Travelers' position on this issue is stated in its brief: [the Liljeberg defendants are] properly liable for all damages flowing from [their] misrepresentation including all unpaid rent and interest at the contract rate . . . The accrued interest is an integral part of the damages caused by the [defendants] and should not be segregated from the outstanding rental." Travelers argues the Cross-Appellees' contrary position is, in essence, a red herring intended to obfuscate the solidary liability of those parties by distinguishing the genesis of liability along tort and contractual lines. **Our reading of the decision of the Louisiana Supreme Court**

> **in *Narcise v. Illinois Central Gulf Railroad Co.*, to the effect that — regardless of the legal nature of the liability of the solidary obligors, *i.e.*, irrespective of the fact that some may be liable in contract and other in tort — each solidary obligor is liable to the obligee for 100% of the indebtedness owed by each other co-obligor, convinces us that Travelers is correct.**

P. App., pp. A-131 to 132. (emphasis added).

The court of appeals was faced directly with Travelers' position that it was entitled to collect from any co-obligor any amounts due by each and with Petitioners' position that the Partnership and Krown could only be compelled to pay those damages for which each is liable in an individual capacity. The court of appeals clearly accepted Travelers' position and rejected that of Petitioners. Accordingly, Travelers could collect from the Partnership whatever was owed by Krown.

The Fifth Circuit correctly affirmed the Second Amended Judgment, which held the Partnership liable, as a solidary obligor and not in its individual capacity, for those amounts owed by Krown. Directly addressing Petitioners' present arguments that the district court had stated in the order and reasons accompanying the First Amended Judgment that "the Partnership . . . shall be solidarily liable with Krown . . . or interest occurring on the principal amount only to the extent of the applicable judicial rate [for prejudgment interest]," the Fifth Circuit explained as follows:

> We resolve this discrepancy by interpreting *Travelers II* to mean that Travelers is entitled to the contract rate of prejudgment interest

> regarding the Krown lease obligations. *Travelers II* explicitly embrace Travelers' position. *See Travelers II* at 6-7 (noting Travelers' position that defendants are liable for "all unpaid rent and interest at the contract rate" and concluding that "Travelers is correct"). We find this expression by the panel more compelling than its reference to "leaving undisturbed a ruling" [the First Amended Judgment] alluded to but not expressly explained. Thus the district court correctly observed that this Court had approved Travelers' entitlement to collect the contract rate of interest on the Krown lease.

P. App., pp. A-11 to 12. In so doing, the Fifth Circuit properly interpreted the Louisiana law of solidary liability. Certiorari review on this issue is not needed.

II.

THIS COURT SHOULD NOT ADHERE TO THE PETITIONERS' MECHANISTIC APPLICATION OF THE LAW OF THE CASE DOCTRINE AND INTERVENE IN THIS LOUISIANA COLLECTION SUIT.

Petitioners argue that Supreme Court Rule 10.1(a) authorizes this Court to review the May 24, 1995, decision of the court of appeals because that opinion ignored "the law of the case and thus sanctioned a departure by the district court from the accepted and usual course of judicial proceedings." These contentions are without merit. The law of case doctrine is by its nature a discretionary doctrine and not a limitation on the power of an appellate court. Moreover, a court of appeals possesses the power not only to interpret but also, if necessary, recall and

change its mandates. Finally, this discrete matter affects only the litigants to this proceeding and is of no public importance. The Court should employ its limited resources for important cases; this is not one.

A. Petitioners Ignore The Discretionary Nature Of The Law Of The Case Doctrine.

The Supreme Court of the United States long ago recognized that the law of the case doctrine is discretionary. As Justice Holmes expounded,

> [i]n the absence of statute the phrase, "law of case," as applied to the effect of previous orders on the later action of the court rendering them in the same case, merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power.

Messinger v. Anderson, 225 U.S. 436, 444, 32 S. Ct. 739, 740, 56 L. Ed. 1152 (1912) (citations omitted). "Law of the case directs a court's discretion, it does not limit the tribunal's power." *Arizona v. California*, 460 U.S. 605, 618, 103 S. Ct. 1382, 1391, 75 L.Ed.2d 319 (1983). Courts have accordingly reasoned that "[t]he doctrine is discretionary and not an inexorable command that rigidly binds a court." *In re Evangeline Refining Co.*, 890 F.2d 1312, 1321-22 (5th Cir. 1989).

Even where the law of the case doctrine applies, federal courts have recognized exceptions for new evidence, changes of law, and clearly erroneous prior decisions that manifest injustice. *United States v. McClain*, 593 F.2d 658, 664-65 (5th Cir.), *cert. denied*, 444 U.S. 918, 100 S. Ct. 234, 62 L. Ed. 2d 173 (1979). *See also, In re Evangeline Refining Co.*, 890 F.2d at 1322; *Browning*

v. Navarro, 887 F.2d 553, 556 (5th Cir. 1989) (reasoning that "[w]e have the discretion to ignore a previous decision if substantially different evidence has been presented, there has been an intervening change in the law, or the prior decision was clearly erroneous and it would work a manifest injustice"). A court may always reconsider its own ruling to avoid perpetrating error. *In re Cajun Electric Power Co-op, Inc.*, 791 F.2d 353, 365 (5th Cir. 1986).

Even assuming the court of appeals did not adhere to its May 31, 1994, mandate, a court of appeals clearly possesses the discretion to disregard the law of the case and to correct errors in the interest of justice. Here, as illustrated above, the Louisiana law of solidary obligations plainly allows for creditors such as Travelers to enforce from each solidary co-obligor the obligation owed by the other. In rendering the May 24, 1995, ruling, the court of appeals possessed the discretion under the law of the case doctrine to correct an erroneous prior mandate to comply with that authority. Petitioners ignore this discretionary authority when they ask this Court to grant their petition based on their incorrect reading of Louisiana solidary obligations law.

B. Petitioners Ignore That The Courts Of Appeals Possess The Power To Interpret And Recall Any Mandate.

Courts of appeals are vested with the authority to interpret their own mandates. *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 256, 16 S. Ct. 291, 293, 40 L. Ed. 414 (1895). *See also, In re Ivan F. Boesky Sec. Litig.*, 957 F.2d 65, 69 (2nd Cir. 1992); *Burton v. Johnson*, 975 F.2d 690, 693 (10th Cir. 1992), *cert. denied*, __ U.S. __, 113 S. Ct. 1879, 123 L. Ed. 2d 497 (1993). To that end, the local rules of the United States Court of Appeals for the Fifth Circuit specifically authorize the courts of appeals to reform their mandates when necessary to prevent injustice. Fifth Circuit Rule 41.2; *Home Life Ins. Co. v. Equitable Equip. Co.*, 694 F.2d 402,

403 (5th Cir. 1982). *See also, In re Incident Aboard the D/B OCEAN KING on August 30, 1980*, 877 F.2d 322, 323 (5th Cir. 1989).

Consistent with the discretionary nature of the law of the case doctrine, the jurisprudence and the local rules of court allow the court of appeals to interpret and recall its mandates. That authority undercuts Petitioners' notion that the law of the case is under all circumstances ironclad and not subject to subsequent modification. Even assuming the correctness of Petitioners' position that the lower courts exceeded the scope of the mandate, the court of appeals could have merely recalled its mandate to describe with more explicitness its ruling on the Partnership's liability as a solidary co-obligor with Krown — a ruling that Petitioners concede and on which they apparently do not seek certiorari review. Indeed, there is nothing that would disallow the court of appeals from recalling its mandate now so as to conform it to its allegedly incorrect subsequent ruling. In their mechanistic application of the rule of mandate, Petitioners place form over substance and ignore the power of the court of appeals to interpret and modify mandates.

C. This Case Is Not Worthy Of Supervisory Review By The Court.

This case lacks significance. It affects only the litigants involved in this proceeding, raises no novel issues of unresolved law, concerns no conflict in the circuits, relates to no important federal question in conflict with the decision of a state court of last resort, and is intertwined with issues of Louisiana state law concerning the scope of solidary obligations. Travelers urges the Court not to exercise its judicial discretion here and to deny the petition.

CONCLUSION

This Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX A — RELEVANT STATUTES AND RULE

Louisiana Civil Code Article 1794

> An obligation is solidary for the obligors when each obligor is liable for the whole performance. A performance rendered by one of the solidary obligors relieves the others of liability toward the obligee.

Louisiana Civil Code Article 1797

> An obligation may be solidary though it derives from a different source for each obligor.

Fifth Circuit Rule 41.2

> A mandate once issued shall not be recalled except to prevent injustice.